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Supreme Court, U.S.
FILED

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IN THE
**SUPREME COURT OF THE UNITED STATES**

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CHRISTOPHER LEE JOHNSON,
Involuntary Plaintiff, Pro Se and
VERONICA MOODY JOHNSON,
Plaintiff, Pro Se,

*Petitioners,*

v.

CITY OF CHESAPEAKE, ET AL.,

*Respondents.*

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Companion Case, United States Court Case No. 02-694 Christopher Lee Johnson and Veronica Moody Johnson, Pro Se, Petitioners, vs. Emerald Greens Property Owners Association Board of Directors, et al., Respondents vs. Emerald Greens Property Owners Association, Respondents.

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Former appeal Veronica Moody Johnson, Pro se, v. City of Chesapeake, et al, FCCA Case No. 99-2256

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOURTH CIRCUIT**

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# PETITION FOR WRIT OF CERTIORARI

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Christopher Lee Johnson, Pro Se
Veronica Moody Johnson, Pro Se
1142 Masters Row
Chesapeake, Virginia 23320
(757) 549-1616

184 pp

## QUESTIONS PRESENTED

1. Whether or not 14-201(B) of the City Code of the City of Chesapeake is unconstitutionally vague in violation of the 14th Amendment?

2. Whether or not the District Court's refusal to grant petitioners' demand for a jury trial to determine whether or not respondent arbitrarily and capriciously denied their application for a special exception based on race after presenting sufficient evidence is a violation of substantive due process in violation of the 5th, 7th and 14th Amendments to the Constitution?

3. Whether or not denial of a jury trial based on the allegation of arbitrary and capricious denial of a special exception based on race upon presenting sufficient evidence is a violation of the Civil Rights Act of 1866?

4. Whether or not partial dismissal of petitioners' claims prior to summary judgment is a violation of the 5th Amendment?

## PARTIES TO THE PROCEEDINGS

**The Fourth Circuit Court of Appeals has misstated the names of the defendants in this case and the capacity in which each is sued. The correct list as filed is as follows:**

The parties to the proceedings are the plaintiffs, Veronica Moody Johnson, pro se, and Christopher Lee Johnson, involuntary plaintiff, petitioners, pro se.

The defendants, respondents, are as follows: The City of Chesapeake, Virginia, itself, a municipal corporation, in its official capacity;

The City Council of the City of Chesapeake, Virginia, in its official capacity, the following members, William E. Ward; Dalton S. Edge; John A. Cosgrove; John M. DeTriquet; Alan P. Krasnoff; Dwight M. Parker; William H. Pierce; Gene A. Waters; Debbie Ritter, in their official capacities as members of the City Council of the City of Chesapeake, Virginia;

William E. Ward; Dalton S. Edge; John A. Cosgrove; Alan P. Krasnoff; Dwight M. Parker; William H. Pierce; Debbie Ritter, in their individual capacities as City Council members;

The Planning Commission of the City of Chesapeake, Virginia, in its official capacity; Rodney L. Foster; Clifton D. Cabarras; Edward L. Hall; Frankie W. Carroll; Bryan L. Collins; Sanny S. Davenport; Larry W. Radford; Gladys A Wilfore; Thomas T. Winborne, in their official capacities as members of the Planning Commission of the City of Chesapeake, Virginia; and;

Rodney L. Foster; Edward L. Hall; Frankie W. Carroll; Sanny S. Davenport; Larry W. Radford; Gladys A Wilfore; Thomas T. Winborne, in their individual capacities as Planning Commission members.

The following four public officials are not named party defendants in their individual capacity, personally, because they did not arbitrarily and capriciously vote to deny petitioners' special exception.

John M. DeTriquet-City Council Member
Gene A. Waters - City Council Member
Bryan L. Collins - Planning Commissioner
Clifton D. Cabarras- Planning Commissioner

All other public officials, named defendants, are sued personally and in their individual capacities as well as in their official capacities for arbitrary and capricious conduct.

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## PETITION FOR WRIT OF CERTIORARI

African American Petitioners ask that this Court issue a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals denying petitioners, pro se, petition for rehearing and rehearing en banc of its decision by per curium opinion to affirm the summary judgment order of the United States District Court, Eastern District of Virginia, Norfolk Division, upon petitioners Amended Bill of Complaint for declaratory judgment, injunction, and damages against respondent for arbitrary and capricious denial of plaintiffs', petitioners', special exception to fence height on a corner lot based on race in violation of the Civil Rights Act of 1866, 42 U.S.C. 1981, 42 U.S.C. 1982, 42 U.S.C. 1983 and the Fourteenth Amendment.

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## OPINIONS BELOW

Unpublished opinion of the Fourth Circuit Court of Appeals dated February 25, 2000 in the case of Veronica Moody Johnson (only) pro se v. The City of Chesapeake, et al., case No. 99-2256, reversing dismissal of Veronica Moody Johnson's claim for monetary damages against respondents on abstention grounds based on 42 U.S.C. 1983. App. Exhibit G.

Chesapeake Circuit Court order dismissing petitioners' state action dated August 23, 2000, Case No. CH-99-557 is attached as Exhibit F.

United States District Court for the Eastern District of Virginia, Norfolk Division, order dated August 10, 2001, Dkt. No. 62, dismissing petitioners' claims of: Fair Housing violations, due process, 42 U.S.C. 1982, conspiracy, all claims of injunctive relief, declaratory judgment, intentional infliction of emotional stress, etc., which petitioners filed a formal objection to in Dkt. No. 64, when petitioners had demanded a jury trial and such had been granted by the court. This order is attached as Exhibit D.

The order and opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, granting summary judgment against petitioners dated March 11, 2002, the Honorable Jerome B. Friedman, acting, is attached in the appendix to this petition as Exhibit C.

The Fourth Circuit Court of Appeals entered an order denying petitioners' petition for rehearing and rehearing en banc. Said order dated (December 16, 2002 )is attached in the appendix to this petition as Exhibit A.

United States District Court for the Eastern District of Virginia, Norfolk Division, order dated April 17, 2002, ordering that the Anthony transcripts of the three administrative certified proceedings, attached to petitioners' Amended Bill of Complaint as evidence, be the

official evidentiary transcripts in this case. Said order is attached as App. Exhibit E.

The Fourth Circuit Court of Appeals denied petitioners' appeal, affirming the judgment of the United States District Court for the Eastern District of Virginia, Norfolk Division. Said order is dated November 7, 2002, and is attached as Exhibit B.

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## JURISDICTION

The Fourth Circuit Court of Appeals entered an order on December 16, 2002, denying Christopher Lee Johnson and Veronica Moody Johnson, petitioners, request for rehearing and rehearing en banc upon the Fourth Circuit Court of Appeals' decision to affirm the order of the United States District Court for the Eastern District of Virginia, Norfolk Division, granting summary judgment to respondents on petitioners Amended Bill of Complaint. The Fourth Circuit Court of Appeals' order is Exhibit A in the appendix to this petition.

The jurisdiction of this court is invoked pursuant to 28 U.S.C.A. Section 1257 and Rule 10(b) of the Rules of the Supreme Court of the United States. The latter provides that a review on writ of certiorari may be considered "when a state court of last resort has decided an important federal question in a way that

conflicts with the decision of another state court of last resort or a United States Court of Appeals." Pursuant to Rule 13 of the Rules of the Supreme Court, this petition is timely field within 90 days after entry of the judgment of the United States Court of Appeals, specifically the order entered on December 16, 2002, by the Fourth Circuit Court of Appeals, denying petitioners' rehearing.

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**CONSTITUTIONAL AND STATUTORY PROVISIONS**

1. The 5th (Fifth) Amendment to the Constitution of the United States provides that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The 7th (Seventh) Amendment to the Constitution of the United States provides that: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right

of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

3. The 14th (Fourteenth) Amendment of the United States Constitution provides that: "Section 1. *Rights guaranteed* - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Rule 56 of the Federal Rules of Civil Procedure provides that: "the district court may enter summary judgment when the motion papers, affidavits, and other evidence submitted to the court show that no genuine issue exists as to any material facts, and that the moving party is entitled to judgment as a matter of law."

5. 42 U.S.C. 1981 provides that: "*(a) Statement of equal rights.* All persons within the jurisdiction of the United State shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by

white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) *"Make and enforce contracts" defined.* For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

*(c) Protection against impairment.* The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

6. 42 U.S.C. 1982 provides that: "All citizens of the United States hall have the same right, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

7. 42 U.S.C. 1983 provides that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable tot he party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial

officer for an act or omission taken in such officers' judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

8. The Civil Rights Act of 1866, Section 1 and Section 10 provide as follows respectively: Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Section 10. And be it further enacted, That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

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**CONCISE STATEMENT OF THE CASE**

The petitioners applied for and received approval to build a fence on their corner lot from their homeowners' association as required. The homeowners association approved petitioners' fence to extend out toward the side street 20 feet. Petitioners only constructed their fence out approximately 12 feet. Directly as a result of the approval received from their homeowners' association, petitioners constructed their fence one foot above the height allowed on a corner lot without a special exception.

14-201(b) specially provides that a citizen can obtain a special exception to fence height after meeting the written guidelines listed in the ordinance. Pursuant to Ex. 10, US District Court Dkt. No. 53, the only two items that petitioner had to meet were:

1. that the fence, wall, or hedge would not interfere with or impede traffic visibility is dealt with in US District Court Dkt. No. 53, Exs. 17 and 18, and in the sworn deposition transcript of Councilman Waters, Ex. 6, page 27, line 20, Mrs. Johnson:

> "So if we don't engage in any complex mathematics, if there is two

inches there, does that indicate to you that there are at least 50 feet between my house and the curb?"

Line 24, Councilman Waters:

"Probably 60 feet."

2. that the fence, wall, or hedge would not have a detrimental effect on the adjoining lots or surrounding properties of the neighborhood.

The detrimental issue is discussed further herein.

Respondents applied arbitrary criteria in order to deny African American petitioners special exception application when petitioners met every written statutory requirement for approval. Despite being warned by the City's legal counsel against a claim against applying arbitrary criteria, to include restrictive covenant enforcement and the issue of a building permit, respondents chose to ignore the advice of the City's legal counsel. At the written request of the attorney for the all white Board of Directors of petitioners' homeowners' association, US District Court Dkt. No. 53, Ex. 2, who were suing petitioners to enforce a separate and different covenant provision which petitioners allege is being applied in a discriminatory manner in that the same covenant provision is not being equally enforced against white members of the association. (See US Supreme Court Companion Case No. 02-694). This situation is a problem in that state courts cannot enforce covenants in violation of

antidiscrimination laws. This is a problem for Emerald Greens Property Owners Association because their case is frivolous as a matter of law.

In essence, the major opposition to petitioners' special exception is Emerald Greens Board of Directors and their lawyer who clearly have a hidden agenda. (See Case Background, Ex. H to this petition.)

## REASONS FOR GRANTING THE WRIT

### 1. 14-201(B) OF THE CITY CODE OF THE CITY OF CHESAPEAKE, VIRGINIA, IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE 14th AMENDMENT.

14-201(B) of the City Code of the Chesapeake, attached as App. I is unconstitutionally vague in that in Criteria No. 7 the meaning of detrimental effect is not defined. For example, "secondary front yard" is clearly defined in the ordinance. There is no uniform criteria whereby every citizen can receive equal treatment under the law with regard to application of the definition of detrimental effect. Criteria Item No. 7 states, "7. that the fence, wall, or hedge will not have a **detrimental effect** on the adjoining lots or surrounding properties in the neighborhood."

Respondents arbitrarily and capriciously accepted and applied whatever interpretation necessary to define detrimental effect in this application process so long as the definition

used to serve respondents' purpose which was to have petitioners' special exception application denied.

Respondents wantonly ignored the testimony of Nicholas E. Gretakis, expert appraiser, verifying that petitioners' fence, as constructed, did not have a detrimental effect on the plaintiffs' property or the surrounding neighborhood ( See U.S. District Court Dkt. No. 53, petitioners' Amended Bill of Complaint, Ex. 12, attached to the Amended Bill of Complaint.)

In United States District Court Dkt. No. 53, petitioners' Amended Bill of Complaint, Ex. 6 attached, which is the transcript of the April 20th, 1999 City Council meeting, Mr. Gretakis, an expert witness, states at page 9, lines 10-25 and page 10, lines 1-4:

> "Mr. Mayor, Vice Mayor, Ladies and Gentlemen of Council: My name is Nicholas E. Gretakis. I am a professional real estate appraiser. I have been appraising real estate since 1949. I have qualified as an expert in all the courts in Tidewater; cities of Norfolk, Portsmouth, Chesapeake, Virginia Beach. I am licensed to appraise real estate in the Commonwealth of Virginia.
>
> I was called by Ms. Veronica Johnson to inspect a fence and wall -- brick wall that she had constructed on the property at 1142 Masters Row in Chesapeake, Virginia, and she posed the following question to me. 'Does the brick

> wall fence as presently constructed have a **detrimental effect** on the adjoining lots or the neighborhood?'
>
> In my professional opinion, this fence does not have a detrimental effect on the adjoining properties. If anything, she has set a higher standard for fence construction in that area than presently exists."

In spite of this expert's live testimony, respondents chose to accept arbitrary applications of the meaning of detrimental effect in order to deny petitioners' special exception application. The Emerald Greens Property Owners Association's lawyer, Mike Inman, states at page 19, line 22 of Ex. 2 of US District Court Dkt. No. 53, "when we go to the Circuit Court, that is another issue. I think it comes into play on your **detrimental effect** on the neighborhood." Mr. Inman had a hidden agenda in that he was seeking to obtain an edge in the lawsuit which the Emerald Greens Property Owners' Association Board of Directors had filed against African American petitioners to enforce a restrictive covenant which was not being enforced equally against white members of the association in violation to federal and state antidiscrimination laws.

Commissioner Winborne at page 27, lines 6-12, Ex. 2, US District Court Dkt. No. 52 states:

> "We have had citizens that if I count correctly, there is something

> like 20 of them here who are expressing their opinion, and **they** are much closer to this than **we** are, that this wall does have in **their opinion** a **detrimental effect** on them. So for that reason, I will continue to vote as I did last time and vote to deny it (petitioners' special exception."

With regard to Commissioner Winborne's statement, first there is nothing in the record which shows who the 20 people were who stood up at the Council meeting. (These 20 people could have been hired.) 20 people did not register to speak and there is no way of knowing who the people were or if they even lived in Emerald Greens Property Owners Association. Since these 20 people did not speak according to the transcripted proceeding, how would Commissioner Winborne know what their opinion was. Specifically, all the **registered** homeowners' association speakers against petitioners' special exception were white. Since Commissioner Winborne is saying that in their opinion, meaning the homeowers, petitioners' fence has a detrimental effect on them, **he is only referring to the wishes of the white people** who registered to speak because the three black people who registered to speak, spoke in favor of granting the petition. Based on Commissioner Winborne's statement he is clearly voting to accommodate the wishes of white members of the association and did not

consider the wishes of blacks who spoke in favor and made no mention of their wishes. **This is a clear showing of racial intent.**

Councilman Cosgrove at page 46, line 16, of the April 20, 1999, City Council meeting, Ex. 3, Dkt. No. 53, states "information that has come out tonight about basically your "Mrs. Johnson's" expertise, (as a licensed contractor)... in light of that I am going to support the denial."

In Councilman Cosgrove's statement here he applies arbitrary standards and votes against petitioners' special exception because petitioner is a licensed contractor. This is unconstitutional pursuant to the 14th Amendment.

Petitioners' outline four pages of evidence in Ex. 8 attached to Dkt. No. 53, their Amended Bill of Complaint, to support the unconstitutional vagueness of 14-201(B) which is attached in the appendix at Ex. I. The US District Court acknowledged the evidence attached to petitioners' Amended Bill of Complaint and specifically drafted an order certifying the Anthony transcripts as the official transcripts and that he had used them to evaluate the facts, in violation of the 5th and 7th Amendments. The order is dated April 17, 2002 and is attached as App. E.

In essence, this vote was anything goes. Detrimental effect according to respondents could be defined as whatever is necessary to have petitioners' special exception denied. There is as demonstrated above no uniform criteria for the definition of detrimental effect in order for each citizen to receive equal treatment,

therefore, the ordinance is unconstitutionally vague in violation of the 14th Amendment.

2. **THE DISTRICT COURT AS AFFIRMED BY THE FOURTH CIRCUIT COURT OF APPEALS REFUSED TO GRANT PETITIONER'S DEMAND FOR A JURY TRIAL TO DETERMINE WHETHER OR NOT RESPONDENT ARBITRARILY AND CAPRICIOUSLY DENIED PETITIONERS' SPECIAL EXCEPTION APPLICATION BASED ON RACE DESPITE THE FACT THAT PETITIONER PRESENTED SUFFICIENT EVIDENCE (THE COURT VIOLATED PETITIONERS' 5th and 7th AMENDMENT RIGHTS).**

Petitioners presented as evidence the best evidence possible in the form of certified transcripts of all administrative proceedings documenting the arbitrary and capricious conduct based on race as complained of in petitioners' Amended Bill of Complaint. The evidence was attached to petitioners' Amended Bill of Complaint and is acknowledged by the court in its order of April 17, 2002, said order is attached in the appendix as Ex. E to this petition.

Petitioners attached a total of 21 evidentiary exhibits to their Amended Bill of Complaint as evidence sufficient to survive summary judgment as a matter of law. (See US District Court Dkt. No. 53, Table of Contents to Exhibits attached to petitioners' Amended Bill of Complaint) which are the evidence is as follows:

Exhibits

1. Plaintiff's application for special exception.
2. Letter to Brent Neilson, Planning Director, from the Emerald Greens Property Owners' Association lawyer, Mike Inman, urging the City not to "Waste" time and resources processing plaintiffs' special exception application.
3. Planning Commission's Background Staff Report
4. Transcript January 27, 1999 Planning Commission Meeting
4A. Transcript Word Index
5. Transcript February 24, 1999 Planning Commission Meeting
5A. Transcript Word Index
6. Transcript April 20, 1999 City Council Meeting
6A. Transcript of Word Index
7. Analysis of "Safety Issues"
8. Outline of Arbitrariness and Capriciousness by Defendants
9. April 8, 1999 Letter to City Council from Ronald Hallman to City Council in which he improperly, unlawfully and unreasonably encloses a letter dated April 6, 1999 from the Emerald Greens Property Owners' Association advising the Council that this covenant information is a relevant issue for their consideration.
10. April 7, 1999 Letter to Ron Hallman, City Attorney, from Jan Proctor, Deputy City Attorney indicating that "covenants" are not a relevant consideration for the special exception; nevertheless, he unreasonably includes the

letter of April 6, 1999 to Council from the EGPOA relating covenant issues as a relevant issue for their consideration.

11. Ordinance Criteria for the Granting of a Special Exception pursuant to Section 14-201(B) of the City Code of Chesapeake.

12. Unrefuted expert appraisal letter from Nicholas E. Gretakis, verifying that the fence, as constructed, did not have a detrimental effect on the plaintiffs' property or the surrounding neighborhood.

13. Fence Safety Certification from Lewis Bridges, Commonwealth of Virginia Engineer, Certified Professional Engineer, with credentials.

14. Case law for the requirements necessary to deviate from the written statutory criteria in the exercise of legislative discretion. Gorieb v. Fox, 145 Va. 554, 563-64, 134 S.E. 914, 917 (12926); Andrews v. Board of Supervisors of Loudon County, 200 Va. 637; 639, 107 S.E.2d 445, 447 (1959).

15. Photo - Special Exception Subject

16. Photo - Special Exception Subject

17. Photo - Special Exception Subject

18. Photo - Special Exception Subject

19. Proof of Unreasonableness by the Defendants

20. City Council Denial Letter

21. Special Exception Statistics.

Pro se petitioners presented plenty evidence to support their claims, but were **RAILROADED** by the District Court and this railroad job was affirmed on appeal. This is a

violation of the 5th and 7th Amendments to the Constitution.

The District Court dismissed this case to protect the City of Chesapeake and its elected officials from the wrath of a jury. Petitioners' case is **meritoriously** documented. The City and the individual respondents have enforced the restrictive covenants of a private organization against a citizen (petitioners). The City Council has no authority whatsoever to enforce the provisions of a private agreement which is what they have done here against the Johnsons, arbitrarily and capriciously denying their right to a special exception based on unlawful criteria of covenant issues and having a building permit.

Based on these facts, the district court as affirmed by the Fourth Circuit Court of Appeals, violated petitioners' 5th and 7th Amendment rights. The district court action was to appease the wishes of white members of petitioners' homeowners' association, giving no consideration to the testimony of the wishes of black members of petitioners' homeowners' association. (See page 12 and 13 herein).

The Court in its order of August 10, 2001, US District Court Dkt. No. 62, the Court states at line 7, "The Johnsons, who are African American, began construction of a brick fence on the secondary front yard of their home at 1142 Masters Row, Chesapeake, Virginia, without the benefit of the requisite permit." **The District Court tried to have it appear that this case is about building a fence**

**without a building permit. That is not what is lawfully before this court.** The Court's repeated emphasis on lack of a building permit is an intentional distraction from the real lawful issue before this court, which is the allegation of unconstitutional denial of petitioners' special exception. **This case is not about not having a building permit.** (See Chesapeake Deputy City Attorney's comments below.) That is not the issue that is before this court and this issue is specifically dealt with in Ex. 10 by Deputy City Attorney, Jan Proctor, in her letter to City Attorney Ronald Hallman dated April 7, 1999. Specifically Ms. Proctor states on page 2 of Ex. 10 in paragraph 3 that "Carl Hall, Director of Inspections, has advised me that the fence will be reviewed for compliance with the Uniform Statewide Building Code at the time an application for a building permit is filed. No such application will be accepted, however, unless City council reverses the Planning Commission's denial of the special exception."

Petitioners' opposition claimed to be concerned about a building permit and safety, but if they were truly concerned about a building permit or safety, respondents and opponents would support the granting of a special exception which would promptly allow for the granting of a building permit and if they had any concerns about safety they could then be addressed. All that notwithstanding, petitioners' fence safety certification is attached as Ex. 13 to US District Court Dkt. No. 53. Respondents never asked petitioners for fence certification

until **after** respondents were sued. In reality, petitioners' opposition to their special exception is doing double-talk and so is the respondent.

The preface to 14-201(B) of the City Code of the City of Chesapeake, it states

> "in the event an application for a fence or wall in the secondary front yard of a corner lot is denied, due to the applicant's inability to meet one (1) or more of this criteria set out above, or in the event the City receives an objection from the owner or occupant of any adjacent property, **the zoning administrator shall deny the requested building permit**. The applicant may then apply for a special exception from the Planning Commission pursuant to subsection B below."

The point here is that petitioners had to be granted a special exception first and a building permit is not listed as a prerequisite to getting a special exception.

Moreover, in Ex. 10 to US District Court Dkt. No. 53, letter of Deputy City Attorney, Jan Proctor, to City Attorney Ronald Hallman dated April 7, 1999, Ms. Proctor states: "Accordingly, Ms. Johnson applied to the Planning Commission for a special exception to fence height restrictions as authorized by Section 14-201(B) of the Chesapeake Zoning Ordinance (copy attached). A special exception may be approved (in this case) upon meeting certain

development criteria listed in the ordinance and upon the Planning Commission finding the following:

1. that the fence, wall, or hedge will not interfere or impede traffic, visibility and
2. that the fence, wall or hedge will not have a detrimental effect on the adjoining lots on surrounding property in the neighborhood."

These two items were the only items that petitioners were lawfully required to meet pursuant to the written statutory guidelines.

With regard to number 2, detrimental effect issue, the expert testimony of Nicholas Gretakis outlined above satisfies this requirement.

With regard to number 1, traffic visibility, Councilman Waters in his sworn deposition measured the cite plan for petitioners' property and disclosed that petitioners' fence is at least 60 plus feet from the curb. (See Waters' deposition transcript, page 27, lines 20-24.) US District Court Dkt. No. 23, Photo Exs. 15, 16, 17, and 18 clearly indicate that this fence does not interfere with traffic visibility, and this is corroborated by the fact there was no objection with relation to any traffic issue reported on the background report as listed on Ex. 3 in Dkt. No. 53.

With regard to Judge Friedman's preoccupation with the fact that petitioners built their fence prior to obtaining a building permit in his orders, plaintiff states the following: a building permit is not a criteria for the granting

of a special exception and should not be considered in this case in that the City has checks and balances to see to it that the necessary safety precautions are taken when there is construction, not necessarily a building permit first all the time. At the February 24, 1999, Planning Commission meeting, at page 23, lines 3-7, Commissioner Radford states' But how can we determine if the footing is in fact in compliance with the City of Chesapeake? Can anybody tell me how we would do that? Would we go dig down one side and measure?"

At page 23, lines 8-12, Ms. Proctor (Deputy City Attorney) states "Commissioner, if I can address that? The building code official had no comments on this application. It is my understanding that certain fences are exempt from the USP (sic) BC in Chesapeake. Page 23, lines 13-14, Commissioner Radford: Even brick walls? "

Page 23, lines 15-17, Ms. Proctor says; I am not certain of that but the fact the building code official didn't have any comments on the application may indicate that."

If the City had a legitimate interest with regard to any safety issue they could have asked for a engineering certification at any time, but they chose not to do so until after petitioner sued them for arbitrary and capricious denial of their special exception based on race. It was only at this time that respondents asked for a certification, and when they asked for it petitioners supplied it.

Respondents were warned by the city legal counsel not to deny petitioners special exception

based on covenant issues or the building permit issue. Deputy City Attorney, Jan Proctor, stated in her letter to City Attorney Ron Hallman dated April 7, 199, US Court Dkt. No. 53, Ex. 10, page 2, line 2, "Mrs. Johnson's neighborhood spoke in opposition to the special exception largely on the ground Mrs. Johnson had constructed her fence in violation of the restrictive covenants for her subdivision. Apparently the homeowners association had filed suit against Mrs. Johnson to enforce the covenants with a trial having been set for August 19, 1999. In light of the comments made by the residents I advised the planning Commission does the City does not enforce restrictive covenants and that Ms. Johnson may have violated these covenants is not a relevant consideration under the criteria set out in the Zoning Ordinance. The respondents ignored legal advice and voted arbitrarily anyway using restrictive covenants and not having a building permit both of which are unlawful criteria to deny petitioners' special exception. This is a violation of the 14th Amendment and it shows intentional wrongdoing and egregiousness by the respondents.

Petitioners met every requirement but were unconstitutionally denied based on the wishes of the all white Board of Directors of the Emerald Greens Property Owners' Association and white membes of the association who were promoting their **not so** hidden agenda of obtaining whatever edge they could in their lawsuit against the petitioners which they had filed to unequally enforce a covenant provision

against African American petitioners that they were not enforcing against the white association members. This created a problem for the association in their lawsuit against petitioners. This was in violation of Civil Rights laws and when they tried to take such claims to state court, they found out that it is unlawful for a state court to enforce racially restrictive covenants, covenants that have a discriminatory effect, and/or covenants that are discriminatorily enforced. For the Circuit Court to allow Emerald Greens Property Owners Association to come into court and unequally enforce a covenant provision against a black, but not enforce the covenant against all white homeowners would be a violation of the 14th Amendment by the state. Racially restrictive covenants are unenforceable by the state as a matter of law. This is why the court just jerked petitioners around in the state case, ordering a trial on their Plea in Equity, then a junior judge coming behind a senior judge and overruling petitioners' trial in a big **vicious jerk-around circle.** (See App. H.)

Essentially Emerald Greens and their lawyers were trying to **do damage control** with their special exception opposition when a lawsuit for violation of the 14th Amendment was eminent for the state if the state enforced the Emerald Greens Property Owners' Association Bill of Complaint as a matter of law. Counsel for Emerald Greens has to answer for his folly for filing to enforce a restrictive covenant provision, specifically the "rear corner rule" as argued in the companion case, US Supreme Court Case

No. 02-694, against blacks while ignoring all the whites that are being allowed to enjoy the same restrictive covenant provision without being sued. Their hidden agenda was to have petitioners' special exception denied to gain an edge in their lawsuit.

This case has never been about a fence. The homeowners' association board and its white members, petitioners' major opponents to their special exception, did not want petitioners to have a swimming pool and to take away petitioners' rights with regard to fence location which would diminish the desirability of a pool with regard to appearance and other factors.

3. **AN APPEAL TO THIS UNITED STATES SUPREME COURT IS A STATUTORY RIGHT IN THIS CASE PURSUANT TO THE CIVIL RIGHTS ACT OF 1866. (PETITIONERS ARE AFRICAN AMERICAN.)**

4. **THE DISTRICT COURT RAILROADED AFRICAN AMERICAN PRO SE PETITIONERS BY GRANTING SUMMARY JUDGMENT AGAINST THEM IN ORDER TO PROTECT THE CITY OF CHESAPEAKE AND ITS ELECTED OFFICIALS FROM A LARGE JURY AWARD IN THAT PETITIONERS' CERTIFIED TRANSCRIPT EVIDENCE OF ALL THREE ADMINSITRATIVE PROCEEDINGS, TOGETHER WITH 18 OTHER UNDISPUTED**

**EVIDENTIARY EXHIBITS ATTACHED TO PETITIOENRS' AMENDED COMPLAINT UNEQUIVOCABLY PROVED ARBITRARY AND CAPRICIOUS CONDUCT BASED ON RACE BY RESPONDENTS.**

See number 2 above.

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## CONCLUSION

Defendants, respondents, with the aid of the district court, affirmed by the Fourth Circuit Court of Appeals, have dragged this case out in an attempt to do to these African American pro se petitioners the same thing the City of Chesapeake, respondent, did to Mr. Marks in the case of Marks v. The City of Chesapeake, Fourth Circuit Court of Appeals No. 88-1732. Chesapeake dragged out that arbitrary and capricious conduct case until Marks, appellant, lost the property that he was seeking a special permit for. Then at trial the court and the City of Chesapeake claimed Marks had lost his property rights when dragging out the case caused Marks to lose his property rights. Justice was delayed, justice was denied.

This is sad for our judicial system and an example of how public officials unconstitutionally manipulate laws to promote personal agendas depriving citizens their right to life, liberty and the pursuit of happiness. This Supreme Court must not allow elected officials

to abuse governmental power. In US District Court Judge Doumar remarked in the Marks case, "justice delayed is justice denied."

The danger of this Supreme Court validating respondents' decision to deny African American pro se petitioners' special exception after petitioners clearly met the statutory guidelines, at the request of a white majority homeowners' association, sends the message that administrative bodies can deny minority citizens constitutional rights based on a popular vote by a white majority homeowners' association as was clearly done in this case. (See page 12 and 13 herein).

This danger is compounded by the influential power of a white majority homeowners' association over the constitutional rights of its minority members, particularly in this case where the Board of Directors of the homeowners' association had no African American representation. The respondents unconstitutionally allowed the majority white homeowners' association board and its white members to have too much influential power over African American petitioners' constitutional right to be granted a special exception in the same way respondent violated Marks' constitutional rights in Fourth Circuit Court of Appeals Case No. 88-1732. (Due to undue, unlawful neighborhood influence).

The decision in this case is clearly arbitrary and irrational and not necessary for the protection of the public health, safety or welfare. The denial in this case, as in the Marks' case, constitutes the mouthing of irrational

bases for an otherwise arbitrary decision. The denial here has not served the purpose for which the ordinance (14-201(B)) was created, violating petitioners' substantive due process rights (14th Amendment). The denial had no substantial rational relationship to the public, health, safety or general welfare.

The Court should grant a writ of certiorari, vacate the decision below, and remand this case for trial on the merits. Ultimately, establishing uniformity of constitutional doctrine is a core basis for the exercise of this court's jurisdiction, and the circumstances of this petition for a writ of certiorari clearly satisfies that fundamental criteria.

**We must complain.**
**Yes-**
**Plain blunt complaining,**
**Ceaseless agitation, and**
**Unfailing exposure of dishonesty and wrong--**
**This is the unerring way to liberty, and we must follow it...."[1]**

Plaintiffs rest!

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[1] Address delivered by Dr. W.E. B. DuBois at the "Celebration of the Centennial of the birth of Abraham Lincoln" on February 12, 1909. This organizing meeting led to the founding of the NAACP.

Respectfully submitted,

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Submitted March 11, 2003

# APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
December 16, 2002

NO. 02-1371
CA-99-736-2

VERONICA MOODY JOHNSON;
CHRISTOPHER LEE JOHNSON
Plaintiffs - Appellants

v.

CITY OF CHESAPEAKE, VIRGINIA, A municipal corporation, Itself; CITY COUNCIL OF THE CITY OF CHESAPEAKE, VIRGINIA, in its official capacity; WILLIAM E. WARD; DALTON S. EDGE; JOHN A. COSGROVE; JOHN M. DE TRIQUET; ALAN P. KRASNOFF; DWIGHT M. PARKER; WILLIAM H. PIERCE; GENE A. WATERS; DEBBIE RITTER, In their individual and official capacities as members of the City Council of the City of Chesapeake, Virginia; PLANNING COMMISSION OF THE CITY OF CHESAPEAKE, VIRGINIA, in its official capacity; RODNEY L. FOSTER, in his individual and official capacity as a member of the Planning Commission of the City of Chesapeake; CLIFTON D. CABARRAS, in his official capacity as a member of the Planning Commission of the City of Chesapeake, Virginia; EDWARD L. HALL, in his official capacity as a member of the Planning Commission of the City of Chesapeake; FRANKIE W. CARROLL; BRYAN L. COLLINS; SANNY S. DAVENPORT; LARRY W. RADFORD; GLADYS A WILFORE; THOMAS T.

WINBORNE, in their individual and official capacities as members of the Planning Commission of the City of Chesapeake, Virginia.
Defendants - Appellees

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On Petition for Rehearing and Rehearing En Banc

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The Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor
Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 02-1371

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VERONICA MOODY JOHNSON;
CHRISTOPHER LEE JOHNSON
Plaintiffs - Appellants

v.

CITY OF CHESAPEAKE, VIRGINIA, A municipal corporation, Itself; CITY COUNCIL OF THE CITY OF CHESAPEAKE, VIRGINIA, in its official capacity; WILLIAM E. WARD; DALTON S. EDGE; JOHN A. COSGROVE; JOHN M. DE TRIQUET; ALAN P. KRASNOFF; DWIGHT M. PARKER; WILLIAM H. PIERCE; GENE A. WATERS; DEBBIE RITTER, In their individual and official capacities as members of the City Council of the City of Chesapeake, Virginia; PLANNING COMMISSION OF THE CITY OF CHESAPEAKE, VIRGINIA, in its official capacity; RODNEY L. FOSTER, in his individual and official capacity as a member of the Planning Commission of the City of Chesapeake; CLIFTON D. CABARRAS, in his official capacity as a member of the Planning Commission of the City of Chesapeake, Virginia; EDWARD L. HALL, in his official capacity as a member of the Planning Commission of the City of Chesapeake; FRANKIE W. CARROLL; BRYAN L. COLLINS; SANNY S. DAVENPORT; LARRY W. RADFORD; GLADYS A WILFORE; THOMAS T.

WINBORNE, in their individual and official capacities as members of the Planning Commission of the City of Chesapeake, Virginia.
Defendants - Appellees

PER CURIAM:

Veronica Moody Johnson and Christopher Lee Johnson appeal the district court's orders: (1) granting the Defendants' motion to dismiss in part; and (2) granting the Defendants' motion for summary judgment and dismissing their civil action. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Johnson v. City of Chesapeake, No. CA-99-736-2 (E.D. Va. Aug. 10, 2001 & March 11, 2002). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Jerome B. Friedman, District Judge. (CA-99-736-2)

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Submitted: October 23, 2002
Decided: November 7, 2002

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Before WILKINS, MOTZ, and TRAXLER, Circuit Judges

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Affirmed by unpublished per curiam opinion.

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Veronica Moody Johnson, Christopher Lee Johnson, Appellants Pro Se. Thomas Jeffrey Salb, Darlene Paige Bradberry, BREEDEN, SALB, BEASLEY & DUVALL, Norfolk, Virginia, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

VERONICA MOODY JOHNSON and
CHRISTOPHER LEE JOHNSON,

Plaintiffs,

v. Civil Action No. 2:99cv736

CITY OF CHESAPEAKE, VIRGINIA
A MUNICIPAL CORPORATION, ITSELF, *et al.*,

Defendants.

**ORDER AND OPINION**

On February 28, 2002, this court heard oral arguments on all pending motions in this case. Specifically, the court addressed the following motions: (1) defendants' Motion for Order to Compel (Dkt. 78);[1] (2) defendants' Motion for Summary Judgment (Dkt. 88); (3)

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[1] This Motion, which was filed on October 23, 2001, sought an order to compel the plaintiffs to make themselves available for depositions. Since the plaintiffs have since been

plaintiffs' Rule 56(f) Motion (Dkt. 115); (4) defendants' Motion for Protective Order (Dkt. 156); (5) plaintiffs' Motion for Protective Order to Extend Court's Schedule (Dkt. 160); (6) plaintiffs' Motion to Compel (Dkt. 165); (7) defendants' Motion to Dismiss and/or for Other Sanctions (Dkt. 168); (8) plaintiffs' Motion to Compel (Dkt. 171); (9) plaintiffs' Motion for Sanctions (Dkt. 172); (10) plaintiffs' Emergency Motion to Recuse Judge Stillman (Dkt. 181); and (11) plaintiffs' Motion to Stay all Proceedings (Dkt. 184). In addition, the plaintiffs filed two appeals of discovery orders issued by Magistrate Judge Stillman, which, while not argued at the hearing, will be addressed by the court in this

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deposed, this Motion is rendered moot and need not be addressed further by the court.

Order. For the reasons more fully articulated below, the court GRANTS the defendants' Motion for Summary Judgment. Furthermore, the court AFFIRMS the Orders issued by Magistrate Judge Stillman which have been appealed, and DENIES the defendants' request for sanctions. As a result of these rulings, the remainder of the Motions are thereby moot.

## I. Factual and Procedural Background

The history of this case is fully discussed in this court's August 10, 2001 Order and Opinion. However, a brief summary will be helpful in addressing the various Motions. Sometime in 1997 or 1998, the Johnsons, who are African-American, began construction of a brick fence on their property at 1142 Masters Row, Chesapeake, Virginia, without the benefit

of the requisite building permit. On or about September 21, 1998, the Department of Inspections for Chesapeake ordered the Johnsons to cease construction on the fence due to their failure to obtain an authorizing building permit. The Johnsons also were notified that they would be required to seek a special exception from the strictures of the Zoning Ordinance for those portions of the fence that exceeded four feet in height. See Zoning Ordinance § 14-201(A), Dkt. 53, Ex. 11.

On or about October 28, 1998, the Johnsons jointly filed an "Application for an Administrative Fence" with the City of Chesapeake Department of Planning. Because adjacent property owners objected to the construction of the Johnsons' fence, the zoning

administrator was without authority to issue the requested building permit. The Johnsons, therefore, were required to seek a special exception to the Zoning Ordinance's height restrictions from the Planning Commission. Id. at § 14-201(B).

On January 27, 1999, the Planning Commission held a hearing with respect to the Johnsons' application for a special exception during which it heard testimony and argument. On this occasion, the Planning Commission's vote resulted in a 4-4 tie. Resolution of the matter was continued to permit consideration of the application by the full nine-member Planning Commission. A second hearing before the Planning Commission was held on February 24, 1999, during which additional testimony and

argument was presented, both in favor of, and in opposition to, the Johnsons' application. At the conclusion of this meeting, the Planning Commission voted 7-2 to deny the Johnsons' application for a special exception. The Johnsons appealed this decision to the City Council where it was likewise denied.

On or about May 19, 1999, Mrs. Johnson filed a pro se lawsuit in the Circuit Court for the City of Chesapeake in which she asserted various statutory and constitutional claims arising out of the denial of the Johnsons' application. That same day, Mrs. Johnson initiated the instant action with the filing of a virtually identical complaint in federal court. On August 23, 1999, the court dismissed Mrs. Johnson's federal lawsuit without prejudice

based upon the Burford abstention doctrine, which provides that it is appropriate for a federal court sitting in equity to decline to exercise jurisdiction where doing so is necessary to show proper regard for state governmental policy. Because this matter involved issues of local zoning law and Mrs. Johnson had a virtually identical suit pending in state court, the court declined to exercise jurisdiction over the case. However, on February 25, 2000, the Fourth Circuit affirmed in part and reversed and remanded in part the court's dismissal of Mrs. Johnson's federal action. Specifically, the Fourth Circuit affirmed the court's dismissal of Mrs. Johnson's equitable claims, but reversed the court's dismissal of her legal claims for money damages. In response to the Fourth

Circuit's decision, the court stayed Mrs. Johnson's reinstated claims for monetary relief pending resolution of her state court action. The court also instructed the parties to provide the court with regular status reports while the February 25, 2000 stay order remained in effect.

On September 15, 2000, Mrs. Johnson filed a motion to reopen her stayed federal suit in light of the dismissal of the state court action.[1] On October 4, 2000, this court granted Mrs. Johnson's motion to lift the stay and ordered the defendants to file pleadings responsive to her complaint. On March 29, 2001, after the defendants filed a Motion to Join

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[1] Judge Kushner of the Chesapeake Circuit Court had dismissed, without prejudice, Mrs. Johnson's state court action on August 23, 1999 because she had refused to join her husband, whom Judge Kushner deemed a necessary party to that action.

a Necessary Party and/or to Dismiss pursuant to Rule 19(a), seeking an order requiring Mrs. Johnson to join her husband as a party plaintiff in this matter, this court granted the defendants' motion because the Johnsons owned their property as Tenants by the Entirety and because they had both filed the application for the special exception. The Johnsons' Amended Complaint was filed on June 5, 2001, Dkt. No. 53. In addition to adding Mr. Johnson as a party plaintiff, the Amended Complaint revised some of the Johnsons' claims. The Amended Complaint included the following claims: (1) violation of the Federal Fair Housing Act, 42 U.S.C. § 3601, et seq.; (2) conspiracy to deprive civil rights; (3) violation of the Civil Rights Act of 1866; (4) violation of 42 U.S.C. § 1981; (5)

violation of 42 U.S.C. § 1982; (6) violation of the Equal Protection Clause of the Fourteenth Amendment;[1] (7) violation of the Due Process Clause of the Fourteenth Amendment; (8) intentional infliction of emotional distress; and (9) loss of consortium.

On June 18, 2001, the defendants filed a Motion to dismiss the Amended Complaint for failure to state a claim. On August 10, 2001, the court issued an order dismissing the plaintiffs' Fair Housing Act, due process, section 1982, conspiracy, intentional infliction of

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[1] The Johnsons' Amended Complaint lists this court as a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. However, in its earlier Opinion, this court construed their Equal Protection claims as brought pursuant to 42 U.S.C. § 1982, which "creates a statutory basis to receive a remedy for the deprivation of a constitutional right." Hughes v. Bledsole, 48 F.3d 1376. 1383 n. 6 (4th Cir. 1995). The court found this construction necessary because the Fourteenth Amendment does not itself create a cause of action. Id.

emotional distress, and loss of consortium claims, as well as the plaintiffs' claim for attorney's fees. The court denied the defendants' Motion to Dismiss plaintiffs' equal protection and section 1981 claims and claims for punitive damages. This Order was appealed by the plaintiffs; however, the Fourth Circuit dismissed the appeal on September 28, 2001.

On December 6, 2001, the defendants filed a Motion for Summary Judgment. Shortly thereafter, the plaintiffs began filing a number of pleadings opposing the defendants' summary judgment filing. These included a Motion for Leave to Propound and Complete FRCP 56(f) (Dkt. 115), Affidavit under FRCP 56(f) of pro se plaintiff Veronica Moody Johnson (Dkt. 116), Emergency Motion for Enlargement of Time to

Respond to Motion for Summary Judgment (Dkt. 129), Affidavit under FRCP 56(e) of plaintiff Veronica Moody Johnson (Dkt. 136), and Affidavit of Veronica Moody Johnson in Opposition to Defendants' Motion for Summary Judgment (Dkt. 142). In response to these motions and other pleadings, the court granted the plaintiffs two extensions to file their response to the defendants' Motion for Summary Judgment. First, at the December 28, 2001 motions hearing, the court ordered the plaintiffs to respond to the defendants' Motion on or before January 14, 2002. The plaintiffs did not meet this deadline. Then, at the January 28,

2002 motions hearing,[1] the court granted the plaintiffs a further extension, ordering that their response be filed no later than 5:00 p.m. on February 11, 2002. Again, the plaintiffs did not meet this deadline and no response was filed. Based on the fact that the plaintiffs were repeatedly given extensions, yet still failed to file their response, the court does not find that granting the plaintiffs additional time to file a response is warranted. Therefore, the court will turn to the merits of the defendants' Motion for Summary Judgment.

## II. Defendants' Motion for Summary Judgment

### A. Standard of Review

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[1] The court's findings from this hearing are memorialized in an order dated February 4, 2002, Dkt. 158.

Summary judgment under Federal Rule of Civil Procedure 56 is appropriate only when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S.Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 106 S.Ct. 2505 (1986); Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 610 (4th Cir. 1985). Once a party has filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the pleadings, but must instead set forth specific facts illustrating genuine issues for trial.

Celotex Corp., 477 U.S. at 322-24. Such facts must be presented in the form of exhibits and sworn affidavits. Failure by plaintiff to rebut the defendant's motion with such evidence will result in summary judgment. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322.

To find against the movants, the court must find both that the facts in dispute are material and that the disputed issues are genuine. As for materiality, the factual dispute must be dispositive of the claim. See Thompson

Everett, Inc. v. National Cable Advertising, L.P., 57 F.3d 1317, 1323 (4th Cir. 1995). Similarly, the genuineness of the factual dispute must be more than a dispute based on speculation or inference, Celotex Corp., 477 U.S. at 327 (finding inter alia that a complete failure of proof on an essential element of the claim may render the facts immaterial); Runnebaum v. Nations Bank of Md., N.A., 123 F.3d 156, 164 (4th Cir. 1997).

Local Rule 56B provides that a brief in support of a motion for summary judgment must provide a specifically captioned section listing all material facts to which the moving party contends there is no genuine issue. Local Rule 56B also provides that a brief submitted in response to a motion for summary judgment is

to include a listing of all material facts as to which the party contends there is a genuine issue necessary to be litigated. The plaintiffs, in failing to respond to the defendants' motion, directly violated the Local Rule. The plaintiffs' failure to respond to the motions for summary judgment or to file a statement of the facts which they claim are in dispute leaves uncontroverted those facts set forth in the defendants' motions. Therefore, pursuant to the Local Rule, the facts set forth by the defendants are deemed admitted to the extent appropriate.

However, the defendants still bear the burden of showing that the facts entitle them to summary judgment as a matter of law. "In considering a motion for summary judgment, [the court] must review the motion, even if

unopposed, and determine from what it has before it whether the moving party is entitled to summary judgment as a matter of law." Custer v. Pan American Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993). Based on this standard, the court reviews the facts and law as to each of the claims. To the extent it is feasible, the court will give the pro se plaintiffs the benefit of the doubt and consider what facts they dispute based on their own affidavits, deposition testimony, and other documentary evidence filed by the plaintiffs.

**B. Equal Protection**

**1. Standard of Review**

The Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."

U.S. Const., Amend XIV. The Equal Protection Clause, which lies at the core of our rule of law, "requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences in application must be justified by the law's purpose." Sylvia Development Corp. v. Calvert Cty, Md., 48 F.3d 810, 818 (4th Cir. 1995). This does not mean, however, that persons in different circumstances cannot be treated differently under the law. Rather, "the essential command of the Equal Protection Clause has always been that the classification of persons which a law applies must be 'reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'" Id. (quoting Royster Guano Co. v.

Virginia, 253 U.S. 412, 415, 40 S.Ct. 560 (1920)).

There are two prongs to the analysis of an equal protection claim. First, the plaintiff must allege that the state has created a classification that singles out a particular group of individuals for special treatment. Even though a state law, such as a zoning ordinance, is facially neutral, its administration or enforcement can effect an unequal application by favoring one class of persons and disfavoring another. Id. at 819. "[I]f the classification is not explicitly stated, the plaintiff bears the initial burden of proving that a classification was nonetheless intentionally utilized." Id.

Second, if the plaintiff has identified such a classification, then a court analyzes the

state's action with the appropriate degree of scrutiny. As a general proposition, state action will be sustained if the classification utilized is "rationally related to a legitimate state interest." Id. at 820. When, however, a classification is based on race, it is subjected to "strict scrutiny and will be sustained only if [the legislative means] are suitably tailored to serve a compelling state interest." Id. (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 1205 S.Ct. 3249 (1985)). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people who institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375 (1943). For that reason, race-based classifications can be

justified only in the most exceptional circumstances and are subjected to the "most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193 (1944).

It is only after the plaintiff proves discriminatory intent that the court then looks at the purpose of the state's action. See Parents, Alumni, and Friends of Taylor School v. City of Norfolk, 37 F.Supp. 2d 435, 443-44 (E.D. Va. 1999) (citing Sylvia Development, 48 F.3d at 819). A plaintiff always has the burden of proving discriminatory intent. Id. In Taylor School, this court noted several factors that may evidence a show of discriminatory intent. Id. at 444 (citing Sylvia Development, 48F.3d at 819). These factors include (1) a consistent pattern of similar actions; (2) the historical background of

the decision; (3) the sequence of events leading to the decision; and (4) contemporary statements made by the decision makers. Id.

**2. Analysis**

The plaintiffs allege that they were "denied the right of special exception as plaintiffs similarly situated and had met criteria and guidelines AS OTHERS who WERE granted the special exception" and that defendants have "denied these black plaintiffs the same or equal rights as others." Amended Complaint, Dkt. 53 ¶¶ 46-47 (emphasis in original). However, as the defendants have pointed out in their Motion for Summary Judgment, the plaintiffs have not produced any evidence to support these allegations. In fact, even without the damaging deposition testimony of Mr. Johnson, Mrs.

Johnson has not produced one shred of evidence to show that she and her husband's application for the special exception was denied based on race.[1]

As stated above, the burden is on the plaintiffs to prove discriminatory intent on the part of the defendants. This court will assess the plaintiffs' proof using the four factor test articulated by the Fourth Circuit. First, the plaintiffs have not shown a consistent pattern of similar actions on the part of the Planning Commission and the City Council. The plaintiffs

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[1] The court notes that for purposes of deciding the defendants' Motion for Summary Judgment, it did not consider the deposition testimony of Mr. Johnson. Rather, the court focused on the evidence submitted by the defendants, the exhibits attached to the plaintiffs' Amended Complaint, and the deposition transcripts of Mrs. Johnson and the individually named defendants.

have attached a list of special exception zoning decisions to their Complaint and Amended Complaint; however, Mrs. Johnson has testified that she does not know (1) how many of those on the list were African-American; (2) how many had applied for a special exception; (3) how many were minorities; (4) how many were involved in hearings in which the special exception was contested; (5) how many witnesses testified in opposition to the special exception request; (6) how many were granted in the face of opposition from neighbors; and (7) how many of those hearings had witnesses who spoke at all in favor or against. See Transcript of Deposition of Veronica Moody Johnson (hereinafter "Mrs. Johnson's deposition"), Dkt.

87, pp. 21-23. In fact, she stated that the only discrimination was against her, and that this was not a pattern or practice case. Id. at 25 and 26. Therefore, factor one is not present in this case.

As for the second and third factors, the plaintiffs allege that the historical background of, and the events leading to, the decision was based on racial animus. In her deposition, Mrs. Johnson was asked to list the factors that showed racial animus by the Planning Commission and the City Council. In response, Mrs. Johnson listed the following: (1) the fact that the members of the planning Commission and the City Council deviated from statutory guidelines for approving special exceptions; (2) that some of the members of the planning

Commission changed their vote from the first hearing to the second; and (3) that she was subjected to a heightened level of scrutiny because of her experience as a licensed contractor. See Mrs. Johnson's deposition, Dkt. 87, pp. 52-53. Mrs. Johnson asked the court to rely on these factors as inferences from which racial animus can be drawn. Id. at p. 33. However, this court has held that it will not rely solely on inferences to assume racial discrimination. See Taylor School, 37 F.Supp. 2d at 444.

In addition, the plaintiffs have submitted the transcripts of the hearings as support for their claim of racial discrimination. See Amended Complaint, Dkt. 53, Exs. 4, 5, 6. However, even when these transcripts are read

in a light most favorable to the plaintiffs, they fail to set forth a scintilla of evidence to support a claim of intentional discrimination. These transcripts show that the defendants relied on the fact that the plaintiffs' fence/wall was a detriment to the adjoining homes - a factor the Planning Commission and the City Council must consider when deciding whether to approve the special exception. See Zoning Ordinance § 14-201(B)(7), Dkt. 53, Ex. 11. While Mrs. Johnson is correct in that the consideration of her status as a licensed contractor was outside the statutory guidelines, it is insufficient to show racial discrimination. Therefore, the plaintiffs have failed to prove racial animus in the historical background of, or the events leading

to, the decisions of the Planning Commission and the City Council.

Finally, as for the fourth factor, there were no contemporary statements made by the decision makers which leads this court to believe that they based their decision on race-based factors. On the contrary, the 20 affidavits submitted in conjunction with the defendants' Motion for Summary Judgment uniformly state that the decision regarding the Johnsons' special exception "was not based in whole or in part on any race-based criteria or consideration, and was not motivated in any respect by discriminatory intent toward Mr. and Mrs. Johnson." See Affidavits in support of Defendants' Motion for Summary Judgment, Dkts. 92-107, 112, 113, 125, 126. In addition,

Mrs. Johnson could not cite any statements made by the decision makers which were based on racial animus. See Mrs. Johnson's Deposition, Dkt. 87, pp. 29-34. Therefore, the plaintiffs have not met the fourth factor.

The plaintiffs contend that because they have not been able to depose the then-City Councilman John Cosgrove, that the whole picture of their case is not yet available and thus, the defendants' Motion for Summary Judgment is premature. At oral argument, Mrs. Johnson stated that Mr. Cosgrove's deposition testimony is the final piece to her racial discrimination picture, and urged the court to allow her to depose Mr. Cosgrove as soon as possible. The defendants, on the other hand, have requested that such a deposition be

postponed due to Mr. Cosgrove's new official duty, Delegate to the General Assembly. The defendants state two reasons for this request. First, they argue that the plaintiffs have already deposed 17 members of the Planning Commission and City Council and have yet to produce one piece of evidence of racial animus. Furthermore, they state that the plaintiffs have already received numerous requests for admission, requests to authenticate documents, answers to two sets of interrogatories, and a sworn affidavit from Mr. Cosgrove, none of which reveals any intentional racial discrimination. Second, the defendants urge this court to allow Mr. Cosgrove to complete this session of the General Assembly before requiring that his deposition be taken, pursuant to Virginia Code

Section 30-6. Va. Code § 30-6 (affording a privilege to members of the Virginia General Assembly for the five days before and for the five days after session to be free from process as a witness in any civil or criminal case).

This court agrees with the defendants' first position. The plaintiffs have received over 1,053 answers to requests for admission, answers to two sets of interrogatories, affidavits from all members of the Planning Commission and City Council, have had the opportunity to review over 70 files from the Office of the Planning Commission, and have deposed all but one of the members of the Planning Commission and City Council. In all of this information, the plaintiffs have yet to cite a single piece of evidence that supports a claim of racial

discrimination. The court does not believe that taking the deposition of Mr. Cosgrove will reveal any such evidence, particularly since the plaintiffs have already received his sworn affidavit and his answers to requests for admission and interrogatories. Therefore, the court denies plaintiffs' request to take the deposition of Mr. Cosgrove.

In sum, the plaintiffs have not provided any evidence to show that the actions of the Planning Commission or City Council were based on improper, intentional discrimination. Therefore, they have not proven an Equal Protection violation. As a result, the defendants' Motion for Summary Judgment as to this claim is granted.

**B. 42 U.S.C § 1981.**

The plaintiffs also contend that the defendants' denials of the special exception constitutes a violation of 42 U.S.C. Section § 1981. Section 1981(a) provides in pertinent part that:

> All persons with the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...

42 U.S.C. § 1981(a). In its earlier Order and Opinion, this court held that the plaintiffs have plead the proper elements of a section 1981 cause of action, specifically that "(1) they are members of a racial minority; (2) the defendant intended to discriminate on the basis of race;

and (3) the discrimination concerned one or more of the activities enumerated in the statute." Campbell v. Grayline Air Shuttle, Inc., 930 F.Supp. 794, 802 (E.D.N.Y. 1996). Further, the plaintiffs have alleged the denial of equal benefit and protection of the laws. This supports a basis for a violation of 42 U.S.C. § 1981(a). See Marcus v. Carrasquillo, 782 F.Supp. 593, 599 (M.D. Fla. 1992) (allegations of racial discrimination in violation of the Equal Protection Clause also stated a claim under section 1981). However, as discussed above, the plaintiffs have failed to proven an Equal Protection violation. Furthermore, the plaintiffs have not produced any evidence to support their claim that the defendants intended to discriminate against them based on their race.

Thus, there is insufficient evidence for a section 1981 claim. Therefore, for the reasons more fully articulated above, the defendants' Motion for Summary Judgment is granted.

**III. Plaintiffs' Appeal of Magistrate Judge Stillman's rulings**

The plaintiffs have appealed two Orders issued by Magistrate Judge Stillman, claiming that Judge Stillman has "misrepresented the facts, left out specific crucial facts, contradicted [himself] within the orders entered on February 4, 2002, and that the same is contrary to existing law, the facts as they exist and fundamental fairness." Notice of Appeal of Both Orders of the Magistrate Court entered February 4, 2002 to the District Court, Dkt. 161. The plaintiffs' second appeal also addresses the same

two Orders by Judge Stillman and offers the same rationale for the appeal.[1] Dkt. 173. In these two Orders, both dated February 4, 2002, the court addressed a number of discovery motions and set new deadlines for the taking of depositions and the filing of various pleadings. By issuing these Orders, Judge Stillman did not act improperly or unethically, nor did he act contrary to existing law. In fact, the court was generous to the plaintiffs, permitting them an extension of time to complete their discovery and to file their response to defendants' Motion for Summary Judgment, even after its previous extension was disregarded by the plaintiffs.

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[1] The second appeal was filed after Judge Stillman issued an Order correcting a date from his previous February 4 2002 Order.

Therefore, this court affirms the Orders appealed by the plaintiffs.

**IV. Defendant's Motion to Dismiss and/or for Other Sanctions**

On February 12, 2002, the day after the plaintiffs' response to defendants' Motion for Summary Judgment was to be delivered to the defendants, the defendants filed a Motion to dismiss and/or for Other Sanctions. Dkt. 168. The defendants cite two reasons for this dismissal. First, they allege that the plaintiffs did not follow the court's Orders in responding to certain discovery requests, arguing that the plaintiff's answers to certain interrogatory questions are evasive, incomplete and/or nonresponsive. Second, they state that the plaintiffs have yet to file a response to their

Motion for Summary Judgment, despite being ordered to by the court. The defendants argue that despite all of the discovery the plaintiffs have received, they have failed to identify a singly act, comment, or statement in support of their allegations of racial discrimination. The defendants also seek an award of attorney's fees and costs.

Since this court has already granted the defendants' Motion for Summary Judgment, the Motion to Dismiss has become moot. However, the court will address the defendants' request for other sanctions, specifically attorney's fees and costs. While the defendants did not cite a statute under which they seek attorney's fees, this court will use 42 U.S.C. § 1988, which

discusses awarding attorney's fees in civil rights violations cases.

Pursuant to section 1988, a "court, in its discretion, may allow the prevailing party,...a, reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. "[I]t is clear that defendants as well as plaintiffs are entitled to an award of fees." Lotz Realty Co., Inc. v. United States Dep't. of Hous. and Urban Dev., 717 F.2d 929, 931 (4th Cir. 1093). "For a defendant to succeed, he must show that the plaintiff's claim 'was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" Id., quoting Christianburg Garment Co., v. EEOC, 434 U.S. 412, 422, 98 S.Ct. 694 (1978). However, "[i]n applying these criteria, it is important that a district court

resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, the action must have been unreasonable or without foundation. Christianburg, 434 U.S. at 422. Additionally, "[a]n unrepresented litigant should not be punished for this failure to recognize factual or legal deficiencies in his claims." Hughes v. Rowe, 449 U.S. 5, 15, 101 S.Ct. 173 (1980) (holding that the standard for awarding attorney's fees to defendants must be applied with special force to actions initiated by pro se litigants).

Thus, the court must determine whether the plaintiffs' claims of discrimination in this case were frivolous, unreasonable, or groundless. It appears to this court that while

the plaintiffs' claims were not meritorious, they were not frivolous or groundless. First, the plaintiffs' claims revolved around what they believed to be racial discrimination by the defendants. See generally, Carr v. Super 8 Motel Developers, Inc., 964 F.Supp. 1046, 1050 (E.D. Va. 1997) (denying defendant's motion for attorney's fees against unsuccessful plaintiffs because the plaintiffs' claims of racial discrimination were not frivolous, unreasonable, or without merit). The court did not grant the defendants' Motion for Summary Judgment based on the frivolity of the plaintiffs' claims. Rather, it granted summary judgment because the plaintiffs could not present specific evidence showing racial animus on the part of the defendants.

Furthermore, the fact that the plaintiffs missed some technicalities in the law (e.g., the fact that the Fair Housing Act only applies to the sale or rental of a home, a claim in their Amended Complaint which was dismissed as a result of the defendants' Rule 12(b)(6) motion), in itself, is not enough to entitle the prevailing parties to attorney's fees. As pro se litigants, the plaintiffs made every effort to support their claims with fact and law. Therefore, this court cannot say that their claims were frivolous, unreasonable, or groundless. Accordingly, the defendants are not entitled to attorney's fees and their motion is DENIED.

**V. Conclusion**

Based on the aforementioned reasons, the defendants' Motion for Summary Judgment is

**GRANTED** and this matter is **DISMISSED**. The Orders of Magistrate Judge Stillman, which were appealed by the plaintiffs, are **AFFIRMED**. The defendants' Motion for Sanctions is **DENIED**. As a result of these rulings, the remainder of the pending motions are rendered moot.

The plaintiffs are **ADVISED** that they may appeal from this final Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this Order.

The Clerk is **DIRECTED** to send a copy of this Order and opinion to the pro se plaintiffs and defendants' counsel.

**IT IS SO ORDERED.**

/s/ Jerome B. Friedman
United States District Judge

Norfolk, Virginia
March 11, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

VERONICA MOODY JOHNSON and
CHRISTOPHER LEE JOHNSON,
Plaintiffs,

v.

Civil Action
No. 2:99cv736

CITY OF CHESAPEAKE, VIRGINIA
A MUNICIPAL CORPORATION, ITSELF, *et al.*,
Defendants.

ORDER AND OPINION

Currently before the Court is the Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6) the Amended Bill of Complaint for Declaratory Judgment and Injunction and Damages ("Amended Complaint") of *pro se* Plaintiffs Veronica Moody Johnson and Christopher Lee

Johnson (the "Johnsons").[1] For the reasons set forth below, Defendants' motion to dismiss is **GRANTED** in part and **DENIED** in part.

## I. Factual and Procedural Background

Sometime in 1997 or 1998, the Johnsons, who are African-American, began construction of a brick fence on the secondary front yard[2] of their home at 1142 Masters Row, Chesapeake, Virginia (the "Premises") without the benefit of

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[1] The caption of the Amended Complaint does not provide a full listing of the Defendants named in this matter. The Defendants identified in Ms. Johnson's original complaint are the City of Chesapeake, Virginia ("Chesapeake" or the "City"), the City Council of the City of Chesapeake (the "City Council"), the individual members of the City Council in their official capacities, the individual members of the City Council who voted against the Johnsons' application in their individual capacities; the Planning Commission of the City of Chesapeake (the "Planning Commission"); the individual members of the Planning Commission in their official capacities, and the individual members of the Planning Commission who voted against the Johnsons' application in their individual capacities.

[2] The City of Chesapeake Code of Zoning Ordinance (the "Zoning Ordinance") defines "secondary front yard" as "the front yard other than that on which the principal dwelling faces." Zoning Ordinance, §14-201(B).

the requisite building permit.[3] On or about September 21, 1998, the Department of Inspections for Chesapeake ordered the Johnsons to cease construction on the fence due to their failure to obtain an authorizing building permit. Dkt. No. 53, Ex. 3. The Johnsons also were notified that they would be required to seek a special exception from the strictures of the Zoning Ordinance for those portions of the fence that exceeded four feet in height. See, Zoning Ordinance, § 14-201(A).

The Zoning Ordinance authorizes the city zoning administrator to approve the issuance of a building permit for a fence or wall in the

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[3] The Johnsons do not deny that they failed to obtain a building permit prior to initiating construction of the fence. They maintain, however, that in November 1995 they received permission from their subdivision's homeowners association to proceed with construction of the fence at issue in this matter. Dkt. 53, Ex. 4, 4:3-11.

secondary front yard of a residential corner lot so long as the height of the fence does not exceed six feet and certain other conditions, including the nonobjection of the owners of adjacent properties, are met. Zoning Ordinance, § 14-210(A). On or about October 28, 1998, the Johnsons jointly filed an "Application for an Administrative Fence" with the City of Chesapeake Department of Planning (the "Planning Department"). Because adjacent property owners did in fact object to the construction of the Johnsons' fence, the zoning administrator was without authority to issue the requested building permit. The Johnsons, therefore, were required to seek a special exception to the Zoning Ordinance's height restrictions from the Planning Commission.. Id.,

§ 14-201(B).

On January 27, 1999, the Planning Commission held a hearing with respect to the Johnsons' application for a special exception during which it heard testimony and argument. On this occasion, the Planning Commission's vote resulted in a 4-4 tie. Resolution of the matter was continued to permit consideration of the application by the full nine-member Planning Commission. Dkt. 53, Ex. 4, 38:22-39:1. A second hearing before the Planning Commission was held on February 24, 1999, during which additional testimony and argument was presented, both in favor of and in opposition to, the Johnsons' application. At the conclusion of this meeting, the Planning Commission voted 7-2 to deny the Johnsons'

application for a special exception. Id., Ex. 5, 32:16-24. Ms. Johnson was advised of her right to appeal the Planning Commission's decision to the City Council. Id., at 33:1-8. See also, Zoning Ordinance, § 14-201(C). Following a third public hearing with respect to the Johnsons' application, the City Council voted to deny the variance. Dkt. No. 53, Ex. 6, 47:15-17.

On or about May 19, 1999, Ms. Johnson filed a *pro se* suit in the Circuit Court for the City of Chesapeake in which she asserted various statutory and constitutional claims arising out of the denial of the Johnsons' application. That same day, Ms. Johnson initiated the instant action with the filing of a virtually identical complaint in federal court. On August 23, 1999, the Court dismissed Ms.

Johnson's federal lawsuit without prejudice based upon the Burford abstention doctrine, which provides that it is appropriate for a federal court sitting inequity to decline to exercise jurisdiction where doing so is necessary to show proper regard for state governmental policy. Because this matter involved issues of local zoning law and Ms. Johnson had a virtually identical suit pending in state court, the Court declined to exercise jurisdiction over the case.

On February 25, 2000, the Fourth Circuit affirmed in part and reversed and remanded in part the Court's dismissal of Ms. Johnson's federal action. Specifically, the Fourth Circuit affirmed the Court's dismissal of Ms. Johnson's equitable claims, but reversed the Court's dismissal of her legal claims for money damages.

In response to the Fourth Circuit's decision, the Court stayed Ms. Johnson's reinstated claims for monetary relief pending resolution of her state court action. The Court also instructed the parties to provide the Court with regular status reports while the February 25, 2000 stay order remained in effect.

On August 29, 2000, Ms. Johnson filed her "Final Status Report," in which she informed the Court that on August 23, 2000, Judge Kushner of the Chesapeake Circuit Court had dismissed without prejudice her related state court action. Judge Kushner had found that dismissal of Ms. Johnson's state court action was appropriate because she had refused to join her husband, whom Judge Kushner deemed a necessary party to that action, despite

being granted thirty days in which to do so. Thus, Ms. Johnson abandoned her state court litigation related to the Johnson's application for a special exception.

On September 15, 2000, Ms. Johnson filed a motion to reopen her stayed federal suit in light of the dismissal of the state court action. On October 4, 2000, the Court granted Ms. Johnson's motion to lift the stay and ordered the Defendants to file pleadings responsive to her complaint. Defendants filed a Motion to Join a Necessary Party and/or to Dismiss pursuant to Rule 19(a). This motion sought an order requiring Ms. Johnson to join her husband as a party plaintiff in this matter. On March 29, 2001, the Court granted the Defendants' motion and required Ms. Johnson to amend her

complaint to include Mr. Johnson as a party plaintiff. The Court later denied Ms. Johnson's motion to reconsider that order.

On June 5, 2001, the Johnsons filed their Amended Complaint, Dkt. No. 53. In addition to adding Mr. Johnson as a party plaintiff, the Amended Complaint revises somewhat the Johnsons' claims. The Johnsons now assert the following causes of action: (1) violation of the Federal Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, (2) conspiracy to deprive civil rights, (3) violation of the Civil Rights Act of 1866, (4) violation of 42 U.S.C. § 1981; (5) violation of 42 U.S.C. § 1982; (7) violation of the Equal Protection Clause of the Fourteenth Amendment; (8) violation of the Due Process Clause of the Fourteenth Amendment; (9)

intentional infliction of emotional distress; and (10) loss of consortium.[4] Plaintiffs seek compensatory ad punitive damages totaling $30,000,000 as well as various forms of equitable relief.

## II. Discussion

A complaint should not be dismissed for failure to state a claim for which relief can be granted under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Migdal v. Rowe Price-Fleming Int'l,

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[4] In light of the Johnsons' status as *pro se* litigants, the Court construes their Equal Protection and Due Process claims as brought pursuant to 42 U.S.C. § 1983, which "creates a statutory basis to receive a remedy for the deprivation of a constitutional right." Hughes v. Bledsole, 48 F.3d 1376 n. 6 (4th Cir. 1995). This construction of the Amended Complaint is necessary because the Fourteenth Amendment does not itself create a cause of action. Id.

Inc., 248 F.3d 321, 325 (4th Cir. 2001). At the motion to dismiss stage in litigation, all well-pleaded factual allegations are assumed to be true and are viewed in the light most favorable to the plaintiff. Advanced Health Care Serv. v. Radford Community Hosp., 910 F.2d 139, 143 (4th Cir. 1990). Motions to dismiss for failure to state a claim are granted "sparingly and with caution in order to make certain that plaintiff is not improperly denied a right to have his claim adjudicated on the merits." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, Civil 2d § 1349 at 192-93 (1990).

As the Fourth Circuit recently emphasized, "Rule 12(b)(6), however, is not without meaning." Migdal, 248 F.3d at 326.

"The presence of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint cannot support the legal conclusion." Id., quoting Young v. City of Mount Rainer, 238 F.3d 567, 577 (4th Cir. 2001). "This requirement serves to prevent costly discovery on claims with no underlying factual or legal basis." Migdal, 248 F.3d at 326.

Defendants seek the dismissal of the Amended Complaint on the grounds that (1) the Court has declined to exercise jurisdiction over Plaintiffs' claims for equitable relief; (2) the doctrine of legislative immunity shields the Defendants from liability; (3) claims related to the decisions of the Planning Commission and City Council are moot; (4) Plaintiffs have failed to

allege a basis for the City of Chesapeake's liability; (5) Plaintiffs have failed to state a claim under any of their asserted causes of action; and (6) Plaintiffs are not entitled to punitive damages or the award of attorneys' fees. Each of these arguments is addressed below.

**A. Plaintiffs' Equitable Claims**

Defendants argue that the Amended Complaint was improperly filed without the leave of Court as required under Rule 15. In particular, Defendants take issue with the inclusion in the Amended Complaint of claims for equitable relief - claims over which the Court declined to exercise jurisdiction pursuant to the Burford doctrine. As discussed above, the Fourth Circuit upheld the Court's decision not to

exercise jurisdiction over equitable claims in this matter.

The purpose of the Court's prior rulings regarding abstention and the appropriateness of a stay related to outstanding claims for money damages was to permit the state courts the opportunity to consider the zoning issues that are at the heart of this case, and which are matters of paramount local concern. Ms. Johnson, however, decided on her own against prosecuting her state court case. Ms. Johnson's strategic decision not to pursue her state case in no way moves the Court to reconsider its ruling to abstain from entertaining claims for equitable relief. Therefore, all claims for injunctive relief and declaratory judgment asserted in the

Amended Complaint remain dismissed without prejudice from this matter.

**B. Immunity Issues**

Defendants argue that they are protected from liability in relation to the denials of the Johnsons' application for a special exception under the doctrine of legislative immunity. "It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." Bogan v. Scott-Harris, 523 U.S. 44, 46, 118 S.Ct. 966, 969, 140 L.Ed.2d 79 (1998). "Such immunity applies both to the legislative body itself and to its individual members." Mainstream Loudoun v. Board of Trustees of the Loudoun Cty Library, 2 F.Supp.2d 783, 788 (E.D. Va. 1998), citing Supreme Ct. of Va. v.

Consumers Union, 466 U.S. 719, 732, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). Legislative immunity is necessary because "a private civil action, whether for an injunction or damages, creates a distraction and forces (legislators) to divert their time, energy, and attention from their legislative tasks to defend the litigation." Eastland v. United States Serviceman's Fund, 421 U.S. 491, 503, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." Tenney v. Brandhove, 341 U.S. 367, 377, 71 S.Ct. 783, 341 U.S. 367 (1951).

The Supreme Court recently extended absolute immunity to local government officials

finding that such officials "are likewise absolutely immune from suit under § 1983 for their legislative activities." Brogan, 523 U.S. at 49. Thus in Brogan, the Supreme Court ruled that city council members acted in a legislative capacity when they voted to adopt an ordinance eliminating a local department of which the respondent was the only employee, and, accordingly, were entitled to the protections of absolute legislative immunity. Id. Where, however, local officials are involved in the enforcement of an ordinance, as opposed to its promulgation, they are not entitled to legislative immunity. Mainstream Loudoun, 2F.Supp.2d at 788 (county library officials immune from liability arising from decision to adopt a policy requiring the installation web-site blocking

software on library computers, but not immune from Section 1983 suit seeking to prevent them from enforcing the policy).

Defendants argue that the Virginia Code recognizes the legislative functions performed by planning commissions. Defendants cite Virginia Code §15.2-2285, which authorizes local planning commissions to prepare and adopt zoning ordinances. At issue in this case, however, is not the promulgation or adoption of a prospective rule, regulation, or ordinance. See 2BD Associates Ltd. Partnership v. Cty Commissioners for Queen Anne Cty, 896 F.Supp. 528, 533-34 (D.Md. 1995) ("process of drafting and adopting a zoning ordinance" is "prospective, legislative-type rulemaking" protected by legislative immunity). Rather, at

issue is whether the Defendants exercised the discretion specifically afforded them under Zoning Ordinance §14-201 to grant or deny special exceptions to the Zoning Ordinance's height restrictions in a manner that affronts the Constitution or certain other provisions of federal law. Such administrative functions do not fall within the protections of the legislative immunity doctrine. Accordingly, Defendants are not absolutely immune from the Johnsons' suit.[5]

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[5] Defendants also argue that, because the Defendants' rejection of the Johnsons' application constituted a refusal to "change" the law to accommodate the Johnsons' request, their actions are legislative in nature and thus protected under the doctrine of sovereign immunity. This argument is merely a reiteration of Defendants' unmeritorious legislative immunity defense. Defendants' denial of the Johnsons' petition for a special exception was not a legislative act that would have resulted in the promulgation of a new or different ordinance. Rather, it was an exercise of administrative discretion specifically provided for under an existing ordinance. Thus, Defendants' enforcement of Zoning Ordinance § 14-201 is not subject to the immunity from suit that the law affords legislators and sovereigns.

**C. Mootness**

Defendants argue, without citation to authority, that Plaintiffs' claims with respect to the decision of the Planning Commission and City Council are moot since the appeal of each of those decisions either failed or was withdrawn. In other words, Defendants argue that Plaintiffs' claims with respect to the Planning Commission's denial of their application became moot when they appealed to the City Council, and their claims against the City Council became moot when Ms. Johnson dropped their state court case.

Defendants' mootness argument is unsupported in the law and without merit. Plaintiffs claim, *inter alia*, that they were denied due process and the equal protection of the laws

by the actions of the Planning Commission and City Council. The Court is at a loss to understand how such claims could be rendered moot simply because the appeals of the substantive decisions of those bodies were either unsuccessful or withdrawn. While the Fourth Circuit has lamented the frequency with which local land-use disputes are recast in federal court as involving constitutional violations, there is no support for Defendants' argument that such actions are somehow rendered moot by the very process that a plaintiff claims was constitutionally defective. See Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 63 (4th Cir. 1992) (noting that "[t]his case involves another land-use dispute that has

landed in federal court through 42 U.S.C.§ 1983").

**D. Municipal Liability**

Defendants argue that Chesapeake must be dismissed from this suit on the grounds that Plaintiffs have failed to allege a cause of action against the City. Defendants, however, concede that a municipality may be held liable for violations of Constitution pursuant to Section 1983. See Monell v. Dep't of Social Serv. of the City of New York, 436 U.S. 686, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (local government units are "included among those persons to whom § 1983 applies"). As discussed above, the court construes Plaintiffs' due process and equal protection claims as brought under section 1983. Accordingly, Chesapeake can be sued

directly under § 1983 ...where...the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's offers." Id. Plaintiffs claim that actions of the City Council and its members, which include, for example, the mayor of Chesapeake, violated certain provisions of the Constitution. Accordingly, if Plaintiffs state a claim for a constitutional violation, there appears at this stage in the litigation to exist a basis for holding the City liable under Section 1983.

**E. Plaintiffs' Individual Causes of Action**

**1. The Fair Housing Act and 42 U.S.C. § 1982**

Plaintiffs allege that their FHA claim "is based on denial of housing privileges/unfair zoning decision related to housing based on race and color." Amended Complaint, ¶ 47. The FHA provides, in pertinent part, as follows:

> [I]t shall be unlawful-
>
> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(b). To state a *prima facie* case of discrimination in violation of the FHA, the Plaintiffs must allege "(1) that they are members of a protected class, (2) the plaintiffs sought and were qualified to rent or purchase an apartment or dwelling, (3) the plaintiffs were denied the opportunity to rent or purchase the apartment or dwelling, and (4) the apartment or dwelling

remained available thereafter." Kenney v. Kemper Nat'l Ins. Cos., 960 F.Supp. 617, 620 (E.D.N.Y. 1997), citing Cabrera v. Jakabovitz, 24 F.3d 372, 381 (2d. Cir. 1994).

Plaintiffs' allegations that they were denied a special exception from the Zoning Ordinance's height restrictions on fences due to their race fail to state a claim under the FHA. At issue in this case are zoning decisions related to a fence on the Premises, which the Johnsons already own. There is no allegation in the Amended Complaint that Plaintiffs were denied the opportunity to rent or purchase a dwelling within the meaning of the FHA.[6] Moreover,

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[6] The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any building, structure, or portion thereof." 42 U.S.C. § 3602(b). The Court's research has located no

there is no allegation that the Plaintiffs were denied "services or facilities" due to their race. That is not to say that zoning decisions by local officials can never give rise to an FHA claim. See, e.g., United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974) (FHA housing discrimination claim existed where it was alleged that city had denied persons housing on the basis of race by adopting zoning ordinance that prohibited the construction of new multiple-family dwellings including proposed low to moderate income housing development). In this case, however, which concerns denial of a special exception for a non-conforming fence, no housing discrimination

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authority holding that a fence such is at issue in this case, qualifies as a "dwelling" under this definition.

under the FHA is properly alleged. Accordingly, Plaintiffs' FHA claim hereby is **DISMISSED**.

**2. Due Process**

The Fourteenth Amendment provides in pertinent part that "nor shall any State deprive any person of life, liberty, or property, without the due process of law." U.S. Const., Amend XIV. Due process has both procedural and substantive components. One of Plaintiffs' primary contentions is that the Defendants' denials of their special exception application were unreasonable, arbitrary, and capricious. This is a claim under substantive due process.

To make out a claim that the Defendants violated substantive due process, Plaintiffs must establish the following elements: (1) that they have a property interest, (2) that the Defendants

deprived the Plaintiffs of their property interest, and (3) that "the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." Sylvia Development Corp. v. Calvert Cty, Md., 43 F.3d 810, 827 (4th Cir. 1995) (emphasis in original). "[I]n the context of a zoning action involving property, it must be clear that the state's action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the safety or the public welfare in its proper sense." Id., quoting Nectow v. Cambridge, 277 U.S. 183, 187-188 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928). Further, "the Supreme Court has narrowed the scope of substantive due process protection in the zoning

context so that such a claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning." Id., citing Village of Belle Terre v. Borass, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

Importantly for this matter, "[i]f there is no cognizable property interest, there is no need to reach the question of whether the purported deprivation was arbitrary or capricious." Gardner, 969 F.2d at 68. It is well settled that the Fourteenth Amendment itself does not create property interests. Id. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..."

Board of Regents v. Roth, 408 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). "To have a property interest in a benefit, a person must have more than a mere abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id.

In the zoning context, "whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval." Gardner, 969 F.2d at 68. "Any significant discretion conferred upon the local agency defeats the claim of a property interest." Id. Under this standard, a cognizable property

interest exists "only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." Id., quoting RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 918 (2d Cir. 1989). Moreover, the standard focuses on the amount of discretion accorded the issuing agency by law, not on whether or to what degree that discretion is actually exercised. Id. "Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest." RRI Realty, 870 F.2d at 918.

The Johnsons do not possess a property interest in the requested special exception

because Zoning Ordinance § 14-201 clearly confers upon the Planning Commission and the City Council significant discretion as to whether to grant or deny special exceptions from the ordinance's restrictions on the height of fences. For example, prior to granting a special exception for fence heights over four feet, the Planning Commission must determine "that the fence, wall or hedge will not have a detrimental effect on adjoining lots of surrounding properties in the neighborhood." Zoning Ordinance § 14-201(B)(7). Thus, the Planning Commission is charged with evaluating the available evidence to make a judgment as to the effect a nonconforming fence might have on adjoining property. Plaintiffs, therefore, cannot maintain that the Planning Commission and City Council

lacked the discretion to deny the special exception. While the Johnsons may have possessed a subjective, unilateral expectation that they would receive the special exception, they had no vested property interest in it. Accordingly, Plaintiffs fail to state a substantive due process claim.

If the Johnsons assert a procedural due process claim, it must fail as well. To state a claim that the Fourteenth Amendment's guarantee of procedural due process was violated, Plaintiffs must establish that (1) they had a property interest (2) of which the Defendants deprived them (3) without the due process of law. Sylvia, 48 F.3d at 826. For the reasons discussed above, Plaintiffs possessed no property interest in the special exception.

Further, there is no allegation that Plaintiffs were denied the process due their application. Plaintiffs received two hearings before the Planning Commission and a hearing before the City Council, and Ms. Johnson filed an appeal to the state court. Both the Planning Commission and the City Council stated their reasons for the denials. The availability of this process was sufficient to satisfy the Fourteenth Amendment. Sylvia, 48 F.3d at 827 (no unfairness in procedure where county board conducted an open hearing at which it heard the positions of all interested parties and appeal to state court was available); Greenspring, 2000 WL 1624496, *7 ("The procedural due process claim easily is dismissed, because administrative and judicial

appeals from all Baltimore County zoning decisions are readily, if not speedily, available.").

For the reasons stated above, Plaintiffs' due process claim hereby is **DISMISSED**.

**3. Equal Protection**

The Fourteenth Amendment also prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV. The Equal Protection Clause, which lies at the core of our rule of law, "requires that the states apply each law, within its scope, equally to persons similarly situation, and that any differences in application must be justified by the law's purpose." Sylvia, 48 F.3d at 818. This does not mean, however, that persons in different circumstances cannot be treated differently under the law. Rather, "the

essential command of the Equal Protection Clause has always been that the classification of persons which a law applies must be 'reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'" Id., quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561-62, 64 L.Ed. 989 (1920).

There are two prongs to the analysis of an equal protection claim. First, Plaintiff must allege that the state has created a classification that singles out a particular group of individuals for special treatment. Even though a state law, such as the Zoning Ordinance, is facially neutral, its administration or enforcement can effect an unequal application by favoring one

class of persons and disfavoring another. Id., at 819. "[I]f the classification is not explicitly stated, the plaintiff bears the initial burden of proving that a classification was nonetheless intentionally utilized." Id.

Second, if the plaintiff has identified such a classification, then a court analyzes the state's action with the appropriate degree of scrutiny. As a general proposition, state action will be sustained if the classification utilized is 'rationally related to a legitimate state interest." Id., at 820. When, however, a classification is based on race, it is subjected to "strict scrutiny and will be sustained only if [the legislative means] are suitably tailored to serve a compelling state interest." Id., citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432,

440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943). For that reason, race-based classifications can be justified only in the most exceptional circumstances and are subjected to the "most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

The Court finds that the Johnsons have stated an equal protection claim. Plaintiffs allege that they were "denied the right of special exception as plaintiffs similarly situated and had

met criteria and guidelines AS OTHERS who WERE granted the special exception" and that defendants have "denied these black plaintiffs the same or equal rights as others." Amended Complaint, ¶¶ 46-47 (emphasis in original). These allegations of race-based application of the Zoning Ordinance are sufficient to survive a motion to dismiss under Rule 12(b)(6). Accordingly, Defendants' motion to dismiss the Amended Complaint's equal protection claim is **DENIED**.

**4. U.S.C. §§ 1981, 1982, and 1985(3)**

Plaintiffs contend that the Defendants' denials of the special exception also constitute

violations of 42 U.S.C. §§ 1981 and 1982[7] and that the Defendants conspired to violate their civil rights. The Court now turns to whether Plaintiffs have stated a claim for which relief can be granted under these causes of action.

Section 1981(a) provides in pertinent part that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...

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[7] In addition to setting forth counts under Sections 1981 and 1982, the Amended Complaint purports to state a separate cause of action under the Civil Rights Act of 1866. In their opposition brief, however, Plaintiffs acknowledge that Sections 1981 and 1982 are the modern codifications of that civil rights legislation. See Hall v. NCAA, 985 F.Supp. 782, 799 (N.D.Ill. 1997). Accordingly, the Court shall not address Plaintiffs' Civil Rights Act of 1866 claim independently.

42 U.S.C. § 1981(a). "The elements of a properly pleaded Section 1981 claim are as follows: (1) the plaintiff is a member of a racial minority; (2) the defendant intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute." Campbell v. Grayline Air Shuttle, Inc., 930 F.Supp. 794, 802 (E.D.N.Y. 1996). Plaintiffs have pled each of these elements. The Johnsons allege intentional discrimination on the basis of their race. Further, as discussed above, Plaintiffs have stated an equal protection claim. Thus, Plaintiffs have alleged the denial of equal benefit and protection of the laws. Marcus v. Carrasquillo, 782 F.Supp. 593, 599 (M.D.Fla. 1992) (allegations of racial discrimination in

violation of the Equal Protection Clause also stated a claim under Section 1981).

Plaintiffs also claim that Defendants' denials of their application for a special exception constituted violations of 42 U.S.C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." In dismissing Plaintiffs' FHA and due process claims, however, the Court has already held that no cognizable real or personal property interest was affected by the Defendants' decisions not to issue the special exception. Accordingly, Plaintiffs fail to state a claim under Section 1982.

Lastly, although Plaintiffs fail to cite a statutory basis for their conspiracy claim, Section 1985(3) provides, in pertinent part, that "[i]f two or more persons in any State or Territory conspire... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws... the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators." 42 U.S.C. § 1985(3).

"To demonstrate a violation of § 1985(3), a plaintiff must show the existence of a conspiracy or a meeting of the minds." Assa'ad-Faltas v. Commonwealth of Virginia, 738 F.Supp. 982,

986 (E.D. Va. 1989). To survive a motion to dismiss, "a plaintiff must plead at least minimum factual support for the existence of a conspiracy" and a meeting of the minds. Id. "Courts have uniformly dismissed actions pursuant to § 1985(3) which contained merely conclusory claims of constitutional deprivations unsupported by factual allegations." Lucas v. Kale, 364 F.Supp. 1345, 1347 (W.D.Va. 1973).

The Court has reviewed the Amended Complaint and finds that Plaintiffs have failed to allege a sufficient factual basis for their conspiracy claim. There are no allegations in the Amended Complaint concerning the existence of an agreement among the Defendants to deny Plaintiffs the equal protection of the laws. Indeed, the only mention

of conspiracy in the Amended Complaint is found on the second page where Plaintiffs simply list their purported causes of action. This is insufficient to state a conspiracy claim under Section 1985(3).

Accordingly, Plaintiffs' claim under Section 1982 and conspiracy claim, which the Court has construed as brought pursuant to Section 1985(3), hereby are **DISMISSED**. Defendants' motion to dismiss Plaintiff's Section 1981 claim, however is **DENIED**.

**5. Intentional Infliction of Emotional Distress and Loss of Consortium**

In addition to Plaintiffs' federal civil rights claims, the Amended Complaint includes state law claims for intentional infliction of emotional distress and loss of consortium. Plaintiffs' loss

of consortium claim is easily dispensed with because loss of consortium is not recoverable in the Commonwealth of Virginia. Goff v. Jones, 47 F.Supp.2d 692, 693 n. 1 (E.D. Va. 1999), citing Carey v. Foster, 345 F.2d 772 (4th Cir. 1965).

Plaintiffs also fail to state a claim for intentional infliction of emotional distress. Nontactile torts such as intentional infliction of emotional distress are "not favored" in Virginia law. Russo v. White, 241 Va. 23, 26 (1991). To prevail on such a claim, Plaintiffs would have to prove (1) the wrongdoer's conduct was intentional or reckless, (2) the conduct was outrageous and intolerable, (3) the alleged wrongful conduct and emotional distress are causally connected, and (4) the distress is

severe. Id. Importantly, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Id., at 27. The Court has reviewed the Amended Complaint as well as the transcripts of the hearings that Plaintiffs incorporate by reference therein, and finds that Plaintiffs have failed to allege the existence of extremely outrageous and atrocious conduct in connection with the Planning Commission's and City Council's denials of their application for a special exception for their fence.

Accordingly, Plaintiff's claims for intentional infliction of emotional distress and loss of consortium hereby are **DISMISSED**.

**F. Punitive damages and Attorneys' Fees**

Defendants seek the dismissal of Plaintiffs' punitive damages claims. It is well established that "punitive damages might be awarded in appropriate circumstances in order to punish violations of constitutional rights." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). Municipalities, however, are immune from punitive damages under 42 U.S.C. § 1983. Id., at 271. In this case, Plaintiffs have sued not only Chesapeake and certain of its agencies and officers in their official capacity, they also seek

to hold officials liable in their individual capacities. At this stage in the litigation, therefore, the Court is not prepared to dismiss Plaintiffs' claims for punitive damages in their entirety. Accordingly, Defendants' motion to dismiss Plaintiffs' claims for punitive damages is DENIED at this time. Defendants may raise these issues again at an appropriate point in the future.

Section 1988 provides that: "In any action or proceeding to enforce [Section 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). A non-lawyer *pro se* litigant is not entitled to attorney's fees under Section 1988. Kay v. Ehrler, 499 U.S. 432, 435, 11

S.Ct. 1435, 113 L.Ed.2d 486 (1991). Plaintiffs' claim for attorney's fees, therefore, is **DISMISSED.**

## III. Conclusion

For the reasons set forth above, Defendants' motion to dismiss is **GRANTED** in part and **DENIED** in part. Specifically, Plaintiffs' Fair Housing Act, due process, Section 1982, conspiracy, intentional infliction of emotional distress, loss of consortium claims are **DISMISSED**. Plaintiffs' claim for attorney's fees is **DISMISSED**. Defendants' motion to dismiss Plaintiffs' equal protection and Section 1981 claims and claims for punitive damages id **DENIED**.

The Clerk is **DIRECTED** to send a copy of this Order to the *pro se* Plaintiffs and Defendants' counsel.

**IT IS SO ORDERED.**

/s/Jerome B. Friedman
United States District Judge

August 10, 2001
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT O VIRGINIA
Norfolk Division

VERONICA MOODY JOHNSON and
CHRISTOPHER LEE JOHNSON,
Plaintiffs,

v. Civil Action No.
2:99cv736

CITY OF CHESAPEAKE, VIRGINIA
A MUNICIPAL CORPORATION, ITSELF, *et al.*,
Defendants.

**ORDER AND OPINION**

It has come to the court's attention that the plaintiffs' March 12, 2002 Motion to Establish the Official Transcript has not been ruled on in this case. On March 11, 2002, this court entered an Order and Opinion granting the defendants' Motion for Summary Judgment and dismissing this case. However, the plaintiffs have appealed this decision, and the court is concerned that the resolution of this instant motion may affect the record on appeal. As

such, the court will address the plaintiffs' motion.

In considering the defendants' Motion for Summary Judgment, this court relied on the transcripts of the Planning Commission and City Council meetings attached to the plaintiffs' Amended Complaint, which, according to the plaintiffs, are the Anthony transcripts. These are also the transcripts that the plaintiffs have indicated they used for their appeal to the Fourth Circuit Court of Appeals. The plaintiffs have also noted that they provided copies of the Anthony transcripts to the defendants. Therefore, for purposes of review on appeal, the Anthony transcripts of the Planning Commission and City Council meetings shall be the official

transcripts as they have been relied upon by this court in making its decisions in this case.

The Clerk is **DIRECTED** to send a copy of this Order to the pro se plaintiffs and defendants' counsel.

**IT IS SO ORDERED.**

/s/ Jerome B. Friedman
United States District Judge

April 17, 2002
Norfolk, Virginia

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

VERONICA MOODY-JOHNSON,
Plaintiff,

v. Chancery No. CH99-557

CITY OF CHESAPEAKE, et al,
Defendants.

**ORDER**

This day came the parties, by counsel, upon motion of the defendant to dismiss the captioned action upon grounds that the Court is without jurisdiction in the absence of all parties having an interest in the outcome of the matter; and

It appearing to the Court that this motion is made for good cause shown; that at a hearing on March 15, 2000, the Court advised all counsel that it was of the opinion that Christopher L. Johnson was an appropriate party to this proceeding and granted the plaintiff

leave to file an Amended Motion for Judgment adding him as an additional party plaintiff, and it appearing to the Court that no amended pleading has been filed by the plaintiff within the said thirty-day period and that the Court is of the opinion that Christopher L. Johnson is a necessary party to this proceeding and that complete relief cannot be afforded absent his participation; and that in the absence of all parties in interest, the Court is without jurisdiction to afford the relief sought, it is:

ORDERED that the captioned action be and the same hereby is DISMISSED WITHOUT PREJUDICE.

ENTER: 8-23-00

/s/ Bruce H. Kushner
Judge

I ASK FOR THIS:
/s/ T. Jeffrey Salb
T. Jeffrey Salb
Attorney for Defendants

SEEN
And objected because it should be dismissed without prejudice to proceed with her case in federal Court.
Veronica Moody Johnson

The ruling does not reflect the issue before the Court which is Plea of Jurisdiction. M. Cox
/s/ Mary E. Cox
Attorney for Veronica Moody Johnson

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VERONICA MOODY JOHNSON,
Plaintiff-Appellant,

v.

CITY OF CHESAPEAKE, VIRGINIA, a Municipal corporation, Itself; CITY COUNCIL OF THE CITY OF CHESAPEAKE, VIRGINIA, in its official capacity; PLANNING COMMISSION OF THE CITY OF CHESAPEAKE, VIRGINIA, in its official capacity; WILLIAM E. WARD; DALTON S. EDGE; JOHN A. COSGROVE; JOHN M. DE TRIQUET; ALAN P. KRASNOFF; DWIGHT M. PARKER; WILLIAM H. PIERCE; DEBBIE RITTER; GENE A. WATERS, In their official capacity as members of the City Council of the City of Chesapeake and Personally, in their individual capacities; RODNEY L. FOSTER; CLIFTON D. CABARRAS; EDWARD L. HALL; FRANKIE W. CARROLL; BRYAN L. COLLINS; SANNY S. DAVENPORT; LARRY W. RADFORD; GLADYS A. WILFORE; THOMAS T. WINBORNE, in their official capacity as members of the Planning Commission of the City of Chesapeake, Virginia and Personally, in their individual capacities,

Defendants-Appellees.

NO. 99-2256

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Appeal from the United States District Court
For the Eastern District of Virginia, at Norfolk.
Jerome B. Friedman, District Judge
(CA-99-736-2)

Submitted: January 18, 2000

Decided: February 25, 2000

Before WIDENER, TRAXLER, and KING,
Circuit Judges

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Affirmed in part, reversed in part, and remanded by unpublished per curiam opinion.

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COUNSEL

Veronica Moody Johnson, Appellant Pro Se, Thomas Jeffrey Salb, BREEDEN, MACMILLAN & GREEN, Norfolk, Virginia, for Appellees.

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OPINION

PER CURIAM:

Veronica Moody Johnson sought a special exception permitting her to keep a five-foot high brick wall she built around her home in Chesapeake, Virginia. The local ordinance limited fence heights to four feet. When the Chesapeake Planning Commission and the Chesapeake City Council both denied her

application, Mr. Johnson filed separate, but essentially identical, actions in federal district court and in the Circuit Court of the City of Chesapeake, seeking injunctive relief and damages. The federal district court dismissed, without prejudice, the federal action, citing *Burford* abstention grounds. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 333-36 (1943) (holding that when timely and adequate state court review is available, federal court sitting in equity should abstain from review of cases involving difficult questions of state law or state's administration of its own regulatory schemes.) Ms. Johnson timely appealed. We hold that the dismissal of Ms. Johnson's claims that sounded in equity was proper. However, because a district court may not dismiss, on *Burford* abstention grounds, claims for damages at law, we reverse the dismissal of those claims.

"[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). However, "federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest." *Id.* (internal quotations and citations omitted). Zoning and land use decisions are fundamentally matters of state law, and Ms. Johnson has a lawsuit pending in state court that virtually duplicates the claims raised in federal court. When it falls within our discretion to do so, we abstain from review of such cases in deference to the state's

complex regulatory scheme for managing land use. See *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994) ("[W]e believe that in the usual case federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases and, in effect, sitting as a zoning board of appeals;[.]"). Thus, to the extent that Ms. Johnson's complaint demanded equitable relief, the district court properly dismissed those demands.

On the other hand, the Supreme Court has held that a district court may not dismiss, under *Burford* abstention, claims for monetary damages at law, noting that, "[W]e have permitted federal courts applying abstention principles in damages actions to enter a stay, but we have not permitted them to dismiss the action altogether." *Quackenbush*, 517 U.S. at 730; see also *Johnson v. Collins Entertainment Co., Inc.*, 199 F.3d 710, 727 (4th Cir. 1999) (noting that "the (Supreme) Court held (in *Quackenbush*) that *Burford* can support only a stay, and not the outright dismissal or remand, of a damages action"). Thus, a district court may not on *Burford* abstention grounds, relinquish jurisdiction over claims for damages at law, and consistent with *Quackenbush*, we reverse the district court's dismissal of Ms. Johnson's damages claims at law. In so reversing, we note that the Sixth Circuit's recent decision in *MacDonald v. Village of Northport*, Michigan, 164 F.3d 964, 970 (6th Cir. 1999), which permitted the complete dismissal of a complain demanding monetary relief, is not to

the contrary. First, insofar as the *MacDonald* court held that "the *Burford* abstention doctrine and the Eleventh Amendment created 'grounds together' to dismiss" the case in its entirety, id, at 973, it is unclear which basis justified the dismissal of the claims for money damages. However, the *MacDonald* court implied that dismissal of the damages claims was not justified on *Burford* grounds, noting that "The Fourth Circuit has recognized that *Quackenbush* overruled *Pomponio* to the extent that *Pomponio* permitted a district court to dismiss an action for damages rather than enter a stay to await the conclusion of state proceedings." MacDonald, 164 F.3d at 969 n.4. Second, while one of the counts in the MacDonald complaint did seek monetary relief, the monetary relief sought was in the nature of restitution. "Because restitution is an equitable remedy, ef . *Maryland Dept. of Human Resources v. United States Dept. of Agriculture*, 976 F.2d 1462, 1482 (4th Cir. 1992) (noting that "equitable nature of restitution"), dismissal of that equitable claim could have been proper on *Burford* grounds. Finally, to the extent that the demand for monetary damages did constitute a claim at law, the Sixth Circuit relied upon the Eleventh Amendment to permit dismissal of the complaint, that the Eleventh Amendment could have been the sole justification for the dismissal of those demands for monetary damages at law. *Count II alleged that the Village had 'taken' the MacDonalds' property without just compensation, and that the MacDonalds were damaged, by the loss of quiet enjoyment of their

property and by the diminution of its value, in an amount over $50,000." *MacDonald*, 164 F.3d at 967.

Therefore, we affirm the dismissal of the claims in equity and reverse the dismissal of the damages claims. We deny Ms. Johnson's motion for oral argument and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

## CASE BACKGROUND

Plaintiff's homeowners association, Emerald Greens Property Owners' Association (the "EGPOA") attempted to rescind an architectural approval to build a fence which had been given in writing over 1 ½ years after the fact when plaintiff had already commenced costly construction in reliance thereupon. The covenants, however, has no provision beyond 30 days for any disapproval. (See Exhibit 31, Plea in Equity Covenants at Book 2510, Page 609).

[This neighborhood consists of 149-single family houses that range from $400,000 to over $1,000,000. The owners are lawyers, doctors, business owners who are very powerful in the local and statewide political process who command politicians to listen when they speak. The Blacks who have moved into the neighborhood in record numbers in recent years have tended to take extreme pride in the presentation of their properties, in that, statistically, some Blacks have had to leap higher hurdles to arrive such a point and there are still those Caucasians who have a difficult time accepting this, like the EGPOA president whose remarks of "Y'all sure do keep the pressure on" and "You won't pull that jury thing on us; we'll have this fence down in 30 days" comment clearly demonstrates racist attitudes and jealousy over the fact that this fence has raised the standard for fences in the neighborhood (Exhibit 13) and increased property values and it belongs to a Black person.

The detrimental effect necessary for a denial here does not exist.]

Plaintiff did not secure a building permit in that a 5-foot brick fence is exempt from the USBV in Chesapeake as there is nothing in the United States Building Code manual which addresses a brick fence. The exempt status of the fence is corroborated by the assistant city attorney's conveyance of her understanding at page 23, line 10 of the February 24, 1999 transcripted proceeding (Exhibit 2). As a direct result of the EGPOA's approval of plaintiff's fence, it was constructed one foot above the four foot planned height for a side yard on a corner lot and plaintiff therefore had to seek a special exception to fence height for a corner lot which is allowed by the City Zoning Ordinance. (See App.VI pursuant to 14-201(B)) And such special exceptions have been freely granted to every Caucasian applicant who went through the process in 1996, 1997 and 1998, but not to plaintiff, who is Black, even thought plaintiff's fence is 95% see through wrought iron and only one foot above the code in one 8-foot section which view is buffered from the rear neighbor by his 25-foot tree. (See Exhibits 14, 15, 16 & 17). Plaintiff's homeowners association (the EGPOA) sued her to tear down her fence despite the fact that they (the EGPOA) misled plaintiff to her detriment by approving the fence in this location, which would cost $22,000 to relocate. Addendum XIV.

Plaintiff duly made proper application for the special exception and was arbitrarily and

capriciously denied (See Addendum III) twice by the Planning Commission and at the appeal to the City Council due to pressures from the Emerald Greens Property Owners' Association who needed desperately to have this special exception denied and get the City to make plaintiff tear down her fence because the frivolous and malicious lawsuit they (the EGPOA) had filed against plaintiff had major problems.

Their problems were/are:

1. They have no damages; plaintiff presented unrefuted probative evidence (Exhibits 8, 9 and 13)
2. They have unclean hands.
3. They are seeking equity but they have not done equity.
4. Equity will not abolish a contract.
5. Petitioner acted in reliance.
6. They waited 18 months to act (the contract gave them 30 days), etc.

The EGPOA had a vested interested in having plaintiff's special exception denied.

The Planning Commission Background report sited no objections to this special exception and plaintiff met every statutory requirement for approval. (See Addendum VI), but was yet arbitrarily and capriciously denied solely because of her color in that every neighbor who spoke against plaintiff's fence was Caucasian, every neighbor who supported the special exception was Black and the Board of Directors of the homeowners' association is all Caucasian, and all Caucasian people who

applied in 1996, 1997 and 1998 were approved for special exceptions (Exhibit 7). The Board of Directors tried to cover up their racist deeds by "electing" a Black man, Joe Washington, to the Board of Directors by proxies a few weeks before they voted to sue plaintiff to tear down her fence and they (the EGPOA Board) also made him head of the architectural committee briefly prior to this even though he was new to the neighborhood from New York and was unfamiliar with the neighborhood or its standards.

In further support of their discriminatory acts, after going through the motions and "voting" in a Black by proxy (I was present at the meeting) just before they (the EGPOA) sued this Black plaintiff to tear down her fence, and after having recently make him architectural director, page 67, line 1, Addendum XV. (Sworn deposition of Mike Lewis, president of the EGPOA). The president of the EGPOA said "Well, when Joe took over, I kept the file on the Johnson's property. I didn't give that to him."

In further racist fashion, the EGPOA was "fortunate" enough to have the former law partner of one of the recent former board members of the EGPOA, Greg Larsen, who is Caucasian and is an acknowledged enemy of the plaintiff, who has acted during the term of this controversy sitting as judge. (Chief Judge Thomas V. Forehand) in the matter of *EGPOA v. Johnson* (Judge Forehand is Caucasian.)

This judge also owns real estate with this same former board member and friend. He

stated that he knew Greg Larsen, his business partner, lived in the neighborhood but did not recuse himself. (See transcript App. XVI, page 5, line 6).

Plaintiff has managed to subsequently have him (Chief Judge Forehand) recuse himself but only after he made a crucial ruling setting a trial on the merits in the case of the *EGPOA v. Johnson*, ignoring plaintiff's Plea in Equity of Laches, detrimental reliance and breach of contract and her demand for a jury trial upon said Plea in Equity pursuant to 8.01-336(D) of the Code of Virginia, which is a statutory right and the chancellor had no discretion to deny the jury trial. *Standardsville Volunteer Fire Co. v. Berry*, 229, Va. 578, 331 S.E.2d 466 (1985). See Exhibit 24 and App. XVII. I

After Chief Judge Forehand overruled plaintiff's exception to praecipe, ignoring plaintiff's demand for a jury trial upon the Plea in Equity and after he was recused, no other judge will sign a lawful decree setting forth the legal status of plaintiff's jury trial upon her Plea in Equity so that she can file an interlocutory appeal for the deprivation of her statutory and constitutional right to a jury trial upon her Plea in Equity as has been properly demanded.

To this day, almost a year has passed and no judge in Chesapeake has signed the lawful decree denying it so that plaintiff can go forth for an interlocutory appeal which has already been noticed pending the entry of a decree upon plaintiff's demand for a jury trial upon a Plea in Equity. [Is this obstruction or justice?]

Your plaintiff's only point here is to establish a basis for her position that she cannot have a fair and impartial trial in any matter in the City of Chesapeake and that this court would be just to intervene in that it is the lawful purpose of this court to intervene when there appears that the likelihood of a timely, fair and impartial trial does not exist for the plaintiff in state court in order to have her constitutional claims fairly and impartially adjudicated.

I pray that his Honorable Court will exercise its jurisdiction to that end.

Statutory Guidelines

14-201(B) of the Chesapeake City Code is as follows:

In the event an application for a fence or wall in the secondary front yard or a corner lot is denied due to the applicant's inability to meet one(1) or more of the criteria set out above, or in the event the city receives an objection from the owner or occupant of any adjacent property, the zoning administrator shall deny the requested building permit. The applicant may then apply for a special exception from the planning commission pursuant to subsection B. below.

B. *Special exception for greater heights on corner lots.* Any owner or occupant of a residential corner lot who cannot meet the criteria set out in subsection A. above may apply to the planning commission for a special exception to the height restrictions applicable to secondary front yards of corner lots, provided that the following requirements are met.

1. Application is made to the planning department, with a list of the names and addresses of the owners and occupants of adjacent properties and a stamped, addressed envelope for each owner or occupant identified on the list.

2. Written notice is mailed on adjacent properties in accordance with the procedure set

out in subsection A.3.e. above, and notice is posted on the corner lot in accordance with subsection C. below.

3. The height of the fence, wall, or hedge does not exceed six (6) feet.

4. The fence, wall, or hedge is constructed or installed on or behind the building line established by the front of the principal dwelling existing on the lot.

5. A ten-foot buffer yard, as shown on an approved landscape plan, is installed and maintained between the fence or wall and the public right-of-way in accordance with buffer yard "A" and "B" as described in section 19-610 of this ordinance.

6. The planning commission determines that the fence, wall, or hedge will not interfere with or impede traffic visibility.

7. The planning commission determines that the fence, wall, or hedge will not have a detrimental effect on adjoining lots of surrounding properties in the neighborhood.

As used in this subsection, the term "secondary front yard" for corner lots shall mean the front yard other than that on which the principal dwelling faces. Where the principal dwelling is situated catercorner on the two (2) front yards, the zoning administrator shall designate the secondary front yard in

consideration of such factors as the widths of the front yards, the location of driveways, the address of the residence, and the prevailing yard patterns in the neighborhood.

UNITED STATES DISTRICT COURT
EASTERN DISRICT OF VIRGINIA
Norfolk Division

VERONICA MOODY JOHNSON,
Plaintiff,

v. Civil Action
No. 2:99cv736

CITY OF CHESAPEAKE, VIRGINIA
A MUNICIPAL CORPORATION, ITSELF, *et al.*,
Defendants.

**ORDER AND OPINION**

Currently before the Court is the Defendants' Motion to Join a Necessary party and/or to Dismiss filed in the above-referenced matter. Defendants move pursuant to Federal Rule of Civil Procedure ("Rule") 19(a) for a Court order requiring that Plaintiff's husband, Christopher Lee Johnson, be joined as a party plaintiff. Defendants also request that, should Plaintiff fail to add Mr. Johnson as a plaintiff in this matter, Plaintiff's complaint be dismissed

pursuant to Rule 12(b)(7) and that the Defendants be awarded attorneys' fees pursuant to Rule 11 and 42 U.S.C. § 1988. Plaintiff, who appears before the Court *pro se*, has filed an opposition to the Defendants' motion.

## I. Factual and Procedural background

On or about October 28, 1998, Mr. and Mrs. Johnson both signed and jointly filed an "Application for an Administrative Fence" with the City of Chesapeake Department of Planning. On May 19, 1999, Plaintiff filed a pro se complaint seeking equitable relief and money damages following the Chesapeake Planning Commission's and the Chesapeake City Council's denials of this application for a special exception from the requirements of the City of Chesapeake's zoning ordinance regarding the

permissible height of fencing on secondary front yard corner lots. Plaintiff alleges that these denials constitute violations of the First, Fifth, and Fourteenth Amendments to the United States Constitution; violate the Fair Housing Act; violate her rights under the Equal Protection Clause of the Fourteenth Amendment; violate her substantive Due Process rights; and constitute discrimination.

In her complaint, Plaintiff requests that the Court make a "binding adjudication of rights between the parties as to the following state and local law issues." First, Plaintiff seeks a declaratory judgment finding that the denials of the Johnsons' application did not bear a "substantial relation" to the public health, safety, morals, or general welfare; were arbitrary

and capricious; and were incorrect under the applicable state statutes and ordinances. Second, Plaintiff seeks a declaration that the Defendants' actions violated various provisions of the Constitution as well as the federal fair housing laws and prohibitions against discrimination under federal law. Third, plaintiff requests that the Court permanently enjoin the Defendants from "further and continuing unreasonable, arbitrary, capricious, unlawful and incorrect application of State and Local Zoning Special Exception Statutes and Ordinances to Complainant's property." Fourth, Plaintiff requests that the Defendants be ordered to "issue to Complainant a special exception on the aforesaid premises 1142 Masters Row in the City of Chesapeake." Finally, Plaintiff seeks $25

million in compensatory and $100 million in punitive damages.

On August 23, 1999, the Court dismissed the Plaintiff's claims without prejudice based upon the Burford abstention doctrine, which provides that it is appropriate for a federal court sitting in equity to decline to exercise jurisdiction where doing so is necessary to show proper regard for state governmental policy. The Court found that, although Plaintiff asserts various causes of action under federal law, her "claims are merely an attempt to appeal an unfavorable zoning decision to federal court." Thus, in light of the Burford abstention doctrine and the fact that the Plaintiff had a virtually identical suit pending in state court, the Court declined to exercise jurisdiction over this matter.

On February 25, 2000, the Fourth Circuit Court of Appeals affirmed in part and reversed and remanded in part the Court's dismissal of Plaintiff's case. Specifically, the Fourth Circuit affirmed the Court's dismissal of Plaintiff's equitable claims, but reversed the Court's dismissal of Plaintiff's legal claims for money damages. In response to the Fourth Circuit's decision, the Court stayed the Plaintiff's reinstated claims for monetary relief pending resolution of her state court action. The Court also instructed the parties to provide the Court with regular status reports while the February 25, 2000 stay order remained in effect.

On August 29, 2000, Plaintiff filed her "Final Status Report," in which she informed the Court that on August 23, 2000, Judge Kushner

of the Chesapeake Circuit Court had dismissed without prejudice her related state court action. Judge Kushner had found that dismissal of Plaintiff's state court action was appropriate because Plaintiff had refused to add her husband as a party to that litigation, despite being granted thirty days in which to do so. In Judge Kushner's opinion, Mr. Johnson was "a necessary party to [that] proceeding as a co-tenant by the entirety" and complete relief could not be afforded absent his participation.[1]

On September 15, 2000, Plaintiff filed a motion to reopen her stayed federal suit in light

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[1] Appended to her Final Status Report, Mrs. Johnson submitted a transcript of the August 23, 2000 hearing before Judge Kushner in which he expressed his "concern from the get-go when we first heard this case on March 15th [that] property owned as tenancy by the entirety, Mrs. Johnson's interest cannot be separate from Mr. Johnson's and, likewise, should the Court be put in a position to ultimately issue an order that pertain[s] to the property, it would only be appropriate if those orders [be] applied to the co-tenants, both Mr. and Mrs. Johnson."

of the dismissal of the state court action. On October 4, 2000, the Court granted Plaintiff's motion to lift the stay and ordered the Defendants to file pleadings responsive to Plaintiff's complaint. Defendants then filed the instant motion.

**II. Discussion**

Defendants move pursuant to Rules 19 and 12(b)(7) for Mr. Johnson's joinder as a necessary party plaintiff or, in the alternative, to dismiss the complaint. Defendants argue that Mr. Johnson is a necessary party to this action because Plaintiff demands a declaratory judgment concerning property owned by Mr. and Mrs. Johnson as tenants by the entirety.[2]

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[2] Attached to the Defendants' motion is a copy of the Johnsons' deed for the property located at 1142 Masters Row, Chesapeake, Virginia. The deed describes the Johnsons'

Moreover, the application for special exception, the denials of which gave rise to this suit, was filed jointly by both Mr. and Mrs. Johnson. Accordingly, the Defendants' actions and decisions at issue in this case relate to the Johnsons' joint property interests, not to interests held by the Plaintiff alone. Defendants argue, therefore, that absent the participation of Mr. Johnson, complete relief cannot be granted, disposition of this action may impair or impede Mr. Johnson's ability to protect his interest in the subject property, and the Defendants may be exposed to a substantial risk of incurring multiple or inconsistent obligations.

Ms. Johnson counters by arguing, in essence, that her husband is not a necessary

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interest in the property "as tenants by the entireties with the right of survivorship as at common law in fee simple."

party because the subject matter of her complaint relates to the violation of the Plaintiff's personal constitutional rights, rather than to the adjudication of property rights held jointly by the Plaintiff and her husband. Mrs. Johnson argues that where a plaintiff attacks the constitutionality of a governmental action, the only relevant inquiry is whether the plaintiff has standing to bring the suit. If so, it is not necessary that each individual who also might possess standing to assert the same constitutional violation be a party to the suit. Plaintiff concludes her argument by stating that "if the subject matter of this litigation were the real property upon which the constitutional violation arises, we would not be in federal court in the first place. Determination of ownership

interest in real estate is not the federal subject matter in this case."

"Rule 19 sets out separate tests for determining whether a party is 'necessary' and 'indispensable.'" Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 440 (4th Cir. 1999). Rule 19(a) defines the circumstances under which a person deemed a necessary party to an action must be joined if feasible. "When a party is necessary, it will be ordered into the action." Id.[3] Rule 18(a), in pertinent part, provides as follows:

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[3] Rule 19(b) provides the procedure courts are to apply under circumstances in which joinder of a party determined to be necessary under Rule 19(a) is not feasible because the person is not subject to service of process or his joinder would deprive the court of subject matter jurisdiction. Rule 19(b) is not relevant to the instant motion because Mr. Johnson is subject to service of process in Virginia and his joinder would not deprive the Court of subject matter jurisdiction, which is based upon the federal questions raised in the Complaint. See, e.g., In re Cleveland v. Cleveland, 53 B.R. 814, 820 (Bankr. E.D. Va. 1985) ("If joinder is feasible, a determination of indispensability under Rule 19(b) is not required.").

> **Persons to be Jointed if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to the substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff, but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

Fed. R. Civ. P. 19(a). "[T]he Rule 19 inquiry is a practical one that 'is addressed to the sound discretion of the trial court.'" Bates v. Cekada, 130 F.R.D. 52, 57 (E.D.Va. 1990), quoting

Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 1108 (4th Cir. 1980).

The Court finds that, under Rules 19(a)(2)(i) and 19(a)(2)(ii), Mr. Johnson is a necessary party to Plaintiff's suit. As noted earlier, Plaintiff's federal constitutional and statutory claims are essentially an attempt to appeal an unfavorable zoning decision to federal court. It is clear, both from Plaintiff's allegations and the relief sought, that disposition of Plaintiff's suit will require a review of the merits of the Johnsons' application for a special exception and a determination with respect to the Johnsons' rights under state and local law to construct a nonconforming fence on property owned by both Mr. and Mrs. Johnson as tenants by the entirety. Although the Court has

abstained from exercising jurisdiction over Plaintiff's claims for declaratory and injunctive relief, a finding of liability against the Defendants for money damages, nevertheless, necessarily would involve legal and factual determinations with respect to the Johnsons' jointly held property rights and review of the Defendants' denials of the Johnsons' jointly filed application for a special exception. All of Ms. Johnson's claims arise from the denials of the Johnsons' joint application; none are particular to her alone. Further, as a tenant by the entirety in the property at issue, Mr. Johnson has precisely the same interest in this litigation as Ms. Johnson.

Accordingly, Mr. Johnson is a necessary party because he "claims an interest relating to

the subject of the action and is so situated that the disposition of the action in [his] absence may as a practical matter impair or impede [his] ability to protect that interest." Fed. R. Civ. P. 19(a)(2)(i). Mr. Johnson's interests in his property and this litigation are in particular jeopardy in light of the fact that Ms. Johnson is proceeding *pro se* in this litigation and, for that reason, cannot be deemed capable of adequately representing his interests. The Court finds that joinder is appropriate out of a concern that Mr. Johnson's interests in this litigation be fully represented and that there be no question as to whether he is bound by its outcome.

Mr. Johnson also qualifies as a necessary party under Rule 19(a)(2)(ii), which provides that joinder is required where necessary to avoid the

risk of a party incurring multiple or inconsistent obligations related to the same interest. It is easily imaginable that Mr. Johnson could file an identical action against these Defendants in state court and receive an interpretation of the ordinances and rights at issue that contradicts any determinations made by this Court. In light of the fact that Mr. and Ms. Johnson both are easily identifiable and have identical interests in this litigation, it is reasonable for the Defendants to wish to have both of the Johnsons before the Court at the same time in the same suit.[4] See

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[4] Although Defendants cite Rule 19(a)(1) as a basis to deem Mr. Johnson a necessary party, they offer no support for the argument that in Mr. Johnson's absence "complete relief cannot be accorded among those *already* parties." Fed. R. Civ. P. 19(a)(1) (emphasis added). Defendants' arguments appears to relate more to the risk of being unable to achieve a full and consistent resolution of the dispute regarding the Johnsons' fence unless Mr. Johnson is joined as a party. This is the concern addressed by Rule 19(a)(2)(ii).

Levitt and Sons, Inc. v. Swinrow, 58 F.R.D. 524, 529 (D. Md. 1973) (owners of lots in a subdivision were necessary parties because "[i]f this Court were to conclude that under Maryland law the sanitary facilities charges in question were valid and enforceable encumbrances, an individual property owner who did not agree with that ruling would not be bound by it but would be entitled to seek a redetermination in a state court of the legal question involved").

**III. Conclusion**

For the reasons set forth above, Defendants' Motion to Join a Necessary Party is **GRANTED**. Plaintiff hereby is **ORDERED** to amend the complaint to join Christopher Lee Johnson as a party plaintiff to this suit with

thirty (30) days of the date of this Order and Opinion.

The Clerk is **DIRECTED** to send a copy of this Order to the *pro se* Plaintiff and to Defendants' counsel.

It is so **ORDERED.**

/s/ Jerome B. Friedman
United States District Judge

March 29, 2001
Norfolk, Virginia

APR 15 2003

No. 02-1354

IN THE

# Supreme Court of the United States

VERONICA MOODY JOHNSON and
CHRISTOPHER LEE JOHNSON,

*Petitioners*,

*v.*

CITY OF CHESAPEAKE, *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

This case arises out of local zoning matter. In 1997 or 1998, the Petitioners began construction of a brick fence on their property at 1142 Masters Row, Chesapeake, Virginia. They did not have a building permit. In September 1998, the Department of Inspections for the City of Chesapeake ordered the Petitioners to cease construction due to the failure to obtain an authorizing building permit, and they were told they would have to seek a special exception from the zoning ordinance for those portions of the fence that exceeded four feet in height. The Johnsons filed an application with the City Department of Planning, but because adjacent property owners objected to the construction of the fence, the zoning administrator was without authority to issue the permit. The Johnsons therefore were required to seek a special exception to the zoning ordinance's height restrictions from the Planning Commission of the City of Chesapeake.

On January 27, 1999, the Planning Commission heard testimony and argument with respect to the Petitioners' application. When the Commission voted on the application, it resulted in a 4-4 tie. The matter was continued until February 24, 1999, when the full nine-member Commission could consider the matter. Additional testimony and argument was heard at that time, and the Commission voted 7-2 to deny the application. The Johnsons appealed the decision to the City Council, where it was denied.

On May 19, 1999, Petitioner Veronica Moody Johnson (Mrs. Johnson) filed a suit, *pro se*, in the Circuit Court of the City of Chesapeake, asserting various statutory and constitutional claims arising out of the denial of the Petitioners' application. This claim was dismissed on August 23, 1999.

Also on May 19, 1999, Petitioner Mrs. Johnson filed a complaint in federal court which was virtually identical to that filed in state court. The lower court dismissed the suit without prejudice based upon the Burford abstention doctrine. On appeal, the Fourth Circuit affirmed the dismissal of the equitable claims, but reversed and remanded with respect to the court's dismissal of Mrs. Johnson's claims for money damages. In response, the lower court stayed the claims for monetary damages pending resolution of the state court matter.

After the dismissal of her state case, Mrs. Johnson filed a motion in the federal district court to reopen the stayed federal suit, which was granted on October 4, 2000. The Respondents filed a Motion to Join a Necessary Party, seeking an Order requiring Mrs. Johnson to join her husband, Christopher Lee Johnson, as a party Petitioner, on the ground that the property in question was owned by the Johnsons as tenants by the entirety, and because they had both filed the application for the special exception. This was granted, and the Johnsons filed an Amended Complaint on June 5, 2001.

The Amended Complaint contained the following claims: (1) violation of the federal Fair Housing Act, 42 U.S.C. § 3601, *et seq.*; (2) conspiracy to deprive civil rights; (3) violation of the Civil Rights Act of 1866; (4) violation of 42 U.S.C. § 1981; (5) violation of 42 U.S.C. § 1982; (6) violation of the Equal Protection Clause of the Fourteenth Amendment, which was construed by the court to be brought pursuant to 42 U.S.C. § 1983; (7) violation of the Due Process Clause of the Fourteenth Amendment; (8) intentional infliction of emotional distress; and (9) loss of consortium.

The Respondents filed a Motion to Dismiss the Amended Complaint for failure to state a claim. On August 10, 2001, the court dismissed all of the Petitioners' claims with the exception of those for violation of 42 U.S.C. § 1981, equal protection, and punitive damages based upon the Petitioners' allegations of racial discrimination. This order was appealed by the Petitioners, but was dismissed by the Fourth Circuit on September 28, 2001, on the Petitioners' motion.

The Respondents filed a Motion for Summary Judgment on December 6, 2001, as to the remaining claims. This was granted on March 11, 2002, after extensive discovery by the Plaintiffs.

The Petitioners appealed in the United States Court of Appeals for the Fourth Circuit, which reviewed the record and found no reversible error. The Petitioners then petitioned the court for rehearing and rehearing *en banc*. These were denied by order filed December 16, 2002.

At various points in their brief, the Petitioners confusingly refer to the Emerald Greens Property Owners Association and Board of Directors. *See, e.g.*, Pet. for Writ of Cert. p. 10. The property at issue is located within a subdivision named Emerald Greens. The Petitioners filed a separate suit against certain Emerald Green defendants about the same fence which was appealed to this Court. (Case No. 02-694) This Court denied the Johnsons' Petition for Writ of Certiorari in that case on January 13, 2003, and rehearing was denied on March 3, 2003. Although the Petitioners refer to Case No. 02-694 as a companion case, it is a separate suit. Emerald Greens is not a party to the present matter and the Petitioners' allegations concerning the homeowners association and board should not be imputed to the present Respondents.

## SUMMARY OF THE ARGUMENT

The Petitioners' Petition for Writ of Certiorari should be denied. First, one of the questions presented (vagueness) was not raised in the courts below. Second, the Petitioners misunderstand the standards on appeal and appear to be asserting new claims against the trial judge which are not properly before the court. Third, this case is not of the character which is of interest to the court under Rule 10 of the Supreme Court of the United States. To the extent that the Petitioners allege the trial court erred in granting summary judgment, the asserted error consists of factual findings, for which a writ is rarely granted. Lastly, the trial court properly granted the Summary Motion for Judgment because the Petitioners failed to present evidence of the elements of their asserted claims.

## REASONS FOR DENYING THE WRIT

### I. THE PETITIONERS' CLAIM THAT SECTION 14-201(B) OF THE CODE OF THE CITY OF CHESAPEAKE IS UNCONSTITUTIONALLY VAGUE IS NOT PROPERLY BEFORE THE COURT FOR REVIEW.

The Petitioners claim that § 14-201(B) Code of the City of Chesapeake is unconstitutionally vague. This claim is raised for the first time in their Petition for Writ of Certiorari. It was not raised in the courts below and therefore is not properly before the court for review. In their amended complaint, actually entitled "Amended Bill of Complaint for Declaratory Judgment and Injunction and Damages", paragraph 1, the Petitioners clearly describe the nature of their claims:

> This is an action for declaratory judgment, permanent injunctive relief, and damages for discrimination on the basis of race in the granting

> of housing related privileges in a zoning decision. This action arises under the Federal Fair Housing Act of 1968, as amended, 42 U.S.C. § 3601, *et seq.* and the Civil Rights Acts of 1866, 42 U.S.C. § 1981 and 1982, and the Fourth Amendment of the United States Constitution.

In addition, Count 2 of the Amended Bill of Complaint added a conspiracy claim. The lower court enumerated the causes of action asserted by the Johnsons in their amended complaint. Pet. for Writ of Cert. App.-60. The Petitioners did not plead a vagueness claim in their Amended Bill of Complaint, and did not assert it in the courts below. The vagueness issue is not properly before this Court and should not be considered. *See United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980).

## II. THE DECISION BELOW DOES NOT PRESENT A CONFLICT.

The Petitioners erroneously invoke 28 U.S.C.A. § 1257 and Rule 10(b) of the Rules of the Supreme Court of the United States, representing that a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. As the record reflects, this case was decided within the federal system so that the cited section and rule cited do not apply.

The Petitioners have not shown that the decision rendered by the Fourth Circuit conflicts with a decision of any other court, much less on some important matter or important federal question. Instead, the Petitioners are seeking a review of the evidence. However, this Court "do[es] not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Rule 10 of the Rules of the United States Supreme Court states that a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The Petitioners merely seek a review of what they consider to be erroneous factual findings. Therefore their Petition should be denied.

## III. SUMMARY JUDGMENT WAS PROPERLY GRANTED.

The Petitioners claim that the grant of summary judgment denied them their constitutional right to a jury trial. In fact, they appear to be attempting to assert new claims directly against the trial court for violation of their constitutional rights. *See, e.g.*, Questions Presented No. 2 "Whether or not the District Court's refusal to grant petitioners' demand for a jury trial. . . . is a violation of the 5th, 7th and 14th Amendments to the [U.S.] Constitution." Pet. for Writ of Cert. p. i.

To the extent that the Petitioners assert that the district court erred in granting summary judgment, the record reflects that summary judgment was warranted. Summary judgment under FED. R. CIV. P. 56 is appropriate when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once a party has properly filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the pleadings, but must instead set forth specific facts illustrating genuine issues for trial. *Id.*

The opinion of March 11, 2002 reflects that the court used the proper standard for summary judgment and viewed the evidence in the light most favorable to the Petitioners. *See* Pet. for Writ of Cert. App. 18-23. The lower court properly dismissed the Petitioners' two remaining claims (equal protection and 42 U.S.C. § 1981), on the grounds that the Petitioners had not produced evidence in support of the elements of their claims. *See* Pet. for Writ of Cert. App. 40-41. The issue on appeal is whether there was a genuine issue of material fact to be decided by the finder of fact. *See, e.g., Celotex Corp.*, 477 U.S. at 322-24.

The Petitioners list 21 evidentiary exhibits and 17 depositions attached to their amended complaint. The written opinion dated March 11, 2002 evidences that the Petitioners' voluminous exhibits and deposition transcripts were reviewed by the district judge and found not to support their claims. Instead, the court found testimony which was damaging to the Petitioners, some of which was not even considered. Pet. for Writ of Cert. App. 28-29, App. 29 n.1.

One of the prongs of an equal protection claim under the Fourteenth Amendment is that the state has created a classification that singles out a group of individuals. *See Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 818-19 (4th Cir. 1995). The Petitioner has the burden of proof on this issue. One factor that evidences discriminatory intent is a consistent pattern of similar actions. *Parents, Alumni & Friends of Taylor School v. City of Norfolk*, 37 F. Supp. 2d 435, 444 (E.D. Va. 1999). Although this was alleged by the Petitioners in their Amended Complaint, they produced no evidence in support of this allegation. Pet. for Writ of Cert. App. 28. In contrast, the Respondents submitted the deposition testimony of the

Petitioners in which they admit that their claim is based on discrimination against them, rather than any evidence of a pattern or practice of racial discrimination by the Respondents. Pet. for Writ of Cert. App. 31. Mrs. Johnson attached a list of special exception zoning decisions to the Amended Complaint, but had no evidence concerning the race of the applicants, or whether the applications for special exception were contested. Pet. for Writ of Cert. App. 30-31. In addition, Mrs. Johnson could not, at the time of her deposition, cite any statements made by the City decision makers which were based on racial animus. Pet. for Writ of Cert. App. 30. Further, the individual Respondents submitted affidavits stating that their decision was not based upon racial animus. The Petitioners' current allegation that there **was** a pattern or practice of racial discrimination was contradicted by their own prior testimony, and most importantly, was not supported by any evidence presented to the trial judge in considering the Respondents' Motion for Summary Judgment. Pet. for Writ of Cert. App. 38. Nor did they present other evidence of improper, intentional discrimination. Pet. for Writ of Cert. App. 38.

Likewise, the court found insufficient evidence to support a claim for violation of 42 U.S.C. § 1981.[1] Whereas the Petitioners alleged they were members of a racial minority and that the Respondents had intentionally discriminated on the basis of race, they produced no evidence of intentional discrimination. Pet. for Writ of Cert. App. 39-40.

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1. All persons with the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to he full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

42 U.S.C. § 1981(a).

The Petitioners discuss the actions and testimony given by their neighbors and the neighborhood property owners association and others at the zoning hearing, and discuss their races, as well as questioning their motives for objecting to her application: however, the motives of her neighbors are irrelevant to the present matter. Instead, what is relevant is whether the Petitioners raised a genuine issue of material fact to prove elements of claims for equal protection and 42 U.S.C. § 1981 against the present Respondents. They did not do so and summary judgment was properly granted.

## IV. THE PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM WAS PROPERLY DISMISSED.

The Petitioners repeatedly refer to the "arbitrary and capricious" standard. *See*, *e.g.*, Petitioners' Reasons for Granting the Writ, Pet. for Writ of Cert., p iv-v, reasons 2 and 4. The standard of "arbitrary and capricious" is utilized in evaluating substantive due process claims under the Fourteenth Amendment. *See Marks v. City Council of the City of Chesapeake, Virginia*, 723 F. Supp. 1155, 1160 (E.D. Va. 1988). Here, the Petitioners' substantive due process claim was dismissed on the Respondents' FED. R. CIV. P. 12(b)(6) motion by Order dated August 10, 2001. *See* Pet. for Writ of Cert. pp. 78-86. The issue on appeal therefore would be whether the lower court properly dismissed their substantive due process claim pursuant to FED. R. CIV. P. 12(b)(6).

There are three elements for a substantive due process claim under the Fourteenth Amendment. These are that: (1) the Petitioners must have a property interest; (2) that the Respondents deprived the Petitioners of their property interest; and (3) that "the state's action falls so far beyond

the outer limits of legitimate governmental action that *no process* could cure the deficiency." *Sylvia Development Corp. v. Calvert City, Md.*, 48 F.3d 810, 827 (4th Cir. 1995). In its written opinion dated August 10, 2001, the district court did not even reach the question of whether the denial of the special exception application was arbitrary and capricious under the third prong. Instead, it held that the Petitioners' must first establish that: (1) they have a vested property interest; (2) which was deprived by the Respondents. Pet. for Writ of Cert. App. 80-84. The court found that the Petitioners did not possess a property interest in the requested special exception because the ordinance clearly conferred upon the Planning Commission and City Council significant discretion as to whether to grant or deny the exception. *Id.* at App. 82-83. While they repeatedly allege that the denial of their special exception was "arbitrary and capricious," the Petitioners do not squarely address the actual basis of the trial court's dismissal of their claim — that they did not have a vested property interest upon which to base a substantive due process claim. The Petitioners therefore provide no basis for finding error in the trial court, and their Petition should be denied.

To the extent the Petitioners seek federal court review of the state zoning decision in the nature of an appeal of allegedly arbitrary and capricious conduct, they are in the wrong forum. The Petitioners had available a recourse in the form of an appeal to the Circuit Court of the City of Chesapeake, but this was only pursued by Petitioner Mrs. Johnson. This case was ultimately abandoned. *See* Pet. for Writ of Cert. at App. 58-59.

## V. THERE IS NO STATUTORY MANDATE THAT THIS MATTER BE GRANTED CERTIORARI.

The Petitioners make the bold allegation, without argument or citation, that because they are African-Americans, they have the statutory right to an appeal to this court, pursuant to the Civil Rights Act of 1866. As this court is well aware, "[r]eview on a Writ of Certiorari is not a matter of right, but of judicial discretion." Rule 10 of the Rules of the Supreme Court of the United States. This act provides no basis for granting the petition.

## CONCLUSION

Summary judgment was properly granted by the trial court in this matter. For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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NO. 02-1354

IN THE
**SUPREME COURT OF THE UNITED STATES**

CHRISTOPHER LEE JOHNSON,
Involuntary Plaintiff, Pro Se and
VERONICA MOODY JOHNSON,
Plaintiff, Pro Se,

*Petitioners,*

v.

CITY OF CHESAPEAKE, ET AL.,

*Respondents.*

Companion Case, United States Court Case No. 02-694 Christopher Lee Johnson and Veronica Moody Johnson, Pro Se, Petitioners, vs. Emerald Greens Property Owners Association Board of Directors, et al., Respondents vs. Emerald Greens Property Owners Association, Respondents.

Former appeal Veronica Moody Johnson, Pro se, v. City of Chesapeake, et al, FCCA Case No. 99-2256

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOURTH CIRCUIT**

# REPLY TO BRIEF IN OPPOSITION

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6 pp

## ARGUMENT

The District Court activated this case based on the fact that the state court proceeding in the Circuit Court of the City of Chesapeake had ended in dismissal. The stay was lifted pursuant to the order of the Fourth Circuit Court of Appeals, Case No. 99-2256. (See App. G) **That petitioner abandoned the state court proceeding is a misrepresentation.**

**Vagueness** of 14-201(B) of the City Code of Chesapeake was presented and outlined below in four pages in the evidence attached to petitioner's sworn complaint as Exhibit 8, U.S.D.C. Dkt. No. 53. Vagueness was cited from the outset in this case and is **NOT** introduced for the first time in this appeal. The vagueness issue is cited in the Fourth Circuit Court of Appeals case below, No. 01-2438, as well at page 4, paragraph 4; page 5, paragraph B; page 9, paragraphs O and P; page 10, paragraphs Q and R; and page 13, paragraph EE.

**There are two appeals to the Fourth Circuit Court of Appeals in this case. The first one Case No. 99-2256 dealt with respondent's motion to abstain. This Fourth Circuit Court of Appeals case is the case that is reopened. Now before this Supreme Court with Veronica Moody Johnson's husband, involuntary plaintiff, Christopher Lee Johnson added by order of the court on motion of respondent.**

There is no basis for respondent's claim of no property interest in this case. Property interest is why the U.S.D.C. claimed it added involuntary plaintiff, Christopher Lee Johnson.

Respondent is refusing to allow petitioners a special exception to fence height on a corner lot specifically provided for within the City Code for the back section of a **one foot by eight foot top portion** of a five foot two inch brick fence which is 95 percent see-through, overall, on three sides, the major portion of the fence is an 18-inch tall brick knee wall (U.S.D.C. Dkt. No. 53, Ex. Nos, 15-18, photos) and is to be completed with wrought iron in between the brick columns. The City has denied petitioners maliciously, arbitrarily, and capriciously to cater to the all white Board of Directors of petitioner's homeowners association, who gave petitioners written approval for the fence height they opposed at all three administrative proceedings, who admitted on the record that they had ulterior motives.

The January 27, 1999 Planning Commission meeting was a 4 to 4 tie vote. The absent commissioner, Ed Hall, admitted in his deposition (which is part of the record) that he is a friend of Rick Matthews, an attorney who is a Board member of petitioner's homeowners association. (See U.S. Sup. Ct. companion case, No. 02-694.) In addition, Commissioner Ed Hall admitted in his deposition that his homeowners association, Las Gaviotas, had previously employed Rick Matthews, (defendant in

companion case) to represent his homeowners association before the Chesapeake Planning Commission previously. Ed Hall, Planning Commissioner, admitted in his sworn deposition that he was a board member at the time Rick Matthews represented Las Gaviotas Homeowners Association before the Planning Commission. **This is conflict.**

The strategic absence of Ed Hall at this first of three public hearings wherein votes were taken on petitioner's special exception gave the respondents the opportunity to get a "read" on how the Planning Commission was going to vote on petitioner's special exception and provided the opportunity for petitioner's homeowners association to conduct a campaign for members who voted to support petitioner's special exception at the January 27, 1999 meeting to change their votes and vote oppositely at the next hearing because Hall had to vote in support to make sure no issue arose with regard to his personal dealings with Matthews, (defendant in U.S. Sup. Ct. companion case No. 02-694.)

This is exactly what happened. Commissioners Radford and Carroll in an admitted first time or rare occurrence reversed their votes from support to opposition against petitioner's special exception at the second Planning Commission meeting of February 24, 1999, but could not cite one fact which had changed to justify switching from support to denial.

Respondent agrees page 2, paragraph 2 in its response that "after the dismissal of her state case Ms. Johnson filed a motion in the Federal District Court to reopen the stayed federal suit which was granted on October 4, 2000." **This was granted only because the state court proceeding had been dismissed, NOT ABANDONDED AS RESPONDENT MISREPRESENTS TO THIS COURT.** The stay was lifted pursuant to Fourth Circuit Court of Appeals order. (See App. G of this petition.)

Petitioner's appeal of the order of August 10, 2001, Petitioner's Exhibit D, dismissing certain of petitioner's claims was **NOT** dismissed by the Fourth Circuit Court of Appeals, **per se**, but was voluntarily withdrawn without opposition by respondents because the district court filed an order that the August 10, 2001 order could **NOT** be appealed until the end of this case in that there are no **interlocutory** appeals in cases such as this, which is a matter of law in federal court. Respondents have misstated and distorted the facts here.

With regard to Supreme Court Case No. 02-694 being a companion case to this case, it is, and petitioners alleged conspiracy between the parties in this case and the companion case to deny petitioner's special exception is the basis as the facts in the record reflect.

**CONCLUSION**

The Civil Rights Act of 1866, Section 10,

states in part ... "a final appeal may be taken to the Supreme Court of the United States."

Petitioners are pro se and their pleadings should not be held to the same standards of a sophisticated, trained attorney, as a matter of law. Petitioners specifically concede that equal justice dictates they get no special treatment. **The petitioners in this case merely seek fundamental fairness**. The record and this petition leave **no doubt whatsoever** that petitioner 's special exception was arbitrarily and capriciously denied and that they are entitled to a trial by jury by the Constitution of the United States.

Respondents specifically made no effort in their response to even **try** to refute this irrefutable evidence.

To deny certiorari in this case is to put politics over the civil rights guaranteed by the Constitution of this great nation. This case goes to the very heart of whether America truly is the world's poster child for human rights (civil rights.) Are we?

Respectfully submitted,

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